87-965

No. .....

FILED
DEC 11 1987

In The
Supreme Court of the United States
October Term, 1987

CITY OF SAN ANTONIO,

Petitioner,

vs.

JEAN ROSOW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UNITED STATES

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1983 changes the substantive and procedural law to be applied by a trial court in a case involving alleged deprivation of procedural and substantive due process rights of a plaintiff—other than to afford a plaintiff a remedy if such deprivations are found to have occurred.

2. If 42 U.S.C. 1983 does not make such changes in the applicable law, whether there was substantial evidence to support the City Manager's decision to fire the respondent in this case.

3. Whether respondent's failure in this case to obtain a jury finding that but for the assumed (arguendo) procedural due process violations of the City Manager she would not have been fired defeats her right to recover compensatory damages for such firing.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, City of San Antonio, a homerule municipal corporation located in San Antonio, Bexar County, Texas, and the Respondent, Jean Rosow.

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In The
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October Term, 1987

CITY OF SAN ANTONIO,
Petitioner,

vs.

JEAN ROSOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UNITED STATES

OPINIONS BELOW

The opinion of the 13th Court of Appeals, an intermediate appellate court, is reported at 716 S.W.2d 633. The opinions of the Texas Supreme Court are reported at 734 S.W.2d 659.

JURISDICTION

The judgment of the Texas Supreme Court was entered on July 9, 1987. The petitioner's motion for rehearing was denied on September 16, 1987. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 2101, Sec. C.

———o———

FEDERAL STATUTORY PROVISION

This case involves the question of the effect of a plaintiff's pleading 42 U.S.C. 1983 in an alleged "wrongful discharge" from public employment case where the case is tried in a state court.

———o———

STATEMENT

1. Course of Proceedings

Charges under the petitioner's civil service rules were filed upon the respondent, a City administrative supervisor, on May 15, 1980. The charges were that respondent was guilty of "discourtesy to fellow employees", among other things. Discourtesy to fellow employees was a ground for removal under the Civil Service Rules adopted by the City Council.

A hearing on these charges was held, as provided by the Rules, and the Civil Service Commission conducting such hearing recommended that the respondent be reinstated to her position. The commission's role in cases of this type is advisory only.

The City Manager, Tom Huebner, to whom the rules gave such power, overruled the commission's recommendation and fired the respondent without any further hearing.

This suit was filed by respondent in the state district court alleging the City Manager did not fully review the evidence before the commission nor did he give the respondent a new hearing before him. These allegations were undisputed. The rules gave him this power.

Huebner's action in firing the respondent was alleged to have violated the due process clause of the 14th U.S. Amendment and to have been "arbitrary and capricious". It also was alleged that Huebner's action violated Art. I, sec. 19 of the state constitution (which is similar to the 14th amendment). 42 U.S.C. 1983 was relied upon by respondent, apparently to give the Court jurisdiction over the case since there was no statutory provision for judicial review.[1]

The petitioner answered with a general denial and an affirmative pleading that Huebner's decision was supported by substantial evidence.

The case was tried in June, 1985 before a jury. At the conclusion of the evidence the trial judge submitted two questions to the jury:

> 1. Whether the City Manager's decision was arbitrary and capricious, to which the jury answered that it was. (This question was one of *law*, as well be shown later, but petitioner did not object to its submission at that time).

---

[1]Texas case law gave the court jurisdiction over the case and respondent thus did not need to plead 42 U.S.C. 1983. *City of Amarillo vs. Hancock*, 239 S.W.2d 788 (Tex. 1951).

2. The amount of damages. The jury answered $150,000.

The petitioner moved for judgment n.o.v. on the ground that Question No. 1 was one of law (TR-45). This motion was denied (TR-47). A judgment, prepared by attorney for respondent, grounded solely upon lack of substantial evidence, was rendered by the Court for the amount of the jury's verdict, plus stipulated attorney's fees, plus reinstatement. (Appendix IV).

This judgment was appealed by petitioner to the intermediate appellate court. The grounds of the appeal were that the sole liability question submitted to the jury —whether Huebner's decision was arbitrary and capricious—was one of law which the jury was powerless to answer, whether objected to or not by petitioner. Numerous authorities—state and federal—were cited in support of the proposition that in judicial review of the decision of an administrator which is claimed to be arbitrary and capricious the sole question is whether such decision was supported by substantial evidence and that whether there was substantial evidence is a question of law. Other authorities which held that whether such administrative decision was arbitrary and capricious was merely another way of asking if it was supported by substantial evidence were also cited. Further authorities were cited in support of the proposition that law questions decided by a jury will not support a judgment, whether their submission is objected to or not.

On the question of procedural due process (the Manager's undisputed failure to review all of the evidence before the Commission or to give respondent a new hear-

ing) the petitioner's position was this: there was no showing that such failures damaged the respondent and indeed no questions were requested by the respondent to be submitted to the jury in such connection and that there was no judicial finding in such respect. The only judicial finding in the judgment was lack of substantial evidence.

As to the latter finding, the petitioner's position was that there was not only substantial evidence, there was copious evidence of the respondent's discourtesy which was not even disputed or sought to be rebutted.

The Court of Appeals reversed the trial court's judgment and rendered judgment for the petitioner. (Appendix III).

The State Supreme Court in opinions by Justice Ray in which four other justices joined and in a concurring opinion by Justice Spears in which three other justices joined, reversed the Court of Appeals decision and affirmed that of the trial court. (Appendix II).

Justice Ray's opinion is murky but it is evident that it was based upon the fallacious concept that a plaintiff's pleading 42 U.S.C. 1983 changes the substantive and procedural law which otherwise binds Texas Courts. Justice Spear's opinion spells out that this is *his* concept. Both opinions clearly reflect the idea that 42 U.S.C. 1983 takes the substantial evidence rule out of administrative review cases.

Petitioner filed a motion for rehearing which was denied on September 16, 1987. (Appendix I).

2. Review of Facts

In both the Court of Appeals and the Supreme Court of Texas the petitioner included in its brief a comprehensive and, it is submitted, accurate summary of the testimony of each witness and of the documentary evidence in this case. This was done because the Texas law requires courts to examine the entire record to determine whether there is substantial evidence to support the decision of the administrator. *R.R. Comm. vs. Shell Oil Co.*, 161 S.W.2d 1022 (Tex. 1942); *Board of Regents vs. Martine*, 607 S.W. 2d 638, error ref'd, no reversible error (1980). A copy of this summary is attached as Appendix V.

The testimony of Americo Canales found at pp. 63-69 of the aforesaid summary comprises the gist of the petitioner's case on the question of whether there was substantial evidence to support the City Manager's decision to fire the respondent for "discourtesy to fellow employees". This testimony was not contradicted nor in any manner impeached. Mr. Canales' testimony was corroborated by that of Mr. Earl Campbell, pp. 69-71. It is submitted that the testimony of both show that respondent's conduct toward Canales was downright discriminatory and demeaning. Both Canales and Campbell testified before the Commission which found "no indication to support the contention that she had been . . . . discourteous."!

———o———

ARGUMENT AND AUTHORITIES

(Reasons for Granting the Petition)

It seems clear to the petitioner that both the majority and the concurring opinions in the Texas Supreme Court misconstrue the role of 42 U.S.C. 1983 in this case, holding that reliance by respondent upon such provision changes the applicable substantive and procedural law from that heretofore decreed by the case law of this state to some other kind of substantive and procedural law set forth by neither opinion.

For example, both opinions clearly reflect the belief, without citing any authorities, that since this case was brought under 42 U.S.C. 1983 as an original action and is not an administrative appeal, the substantial evidence rule does not apply. (The intermediate court had held, in effect, that the fact this was an original action did not mean that the applicable law was different from that in an administrative appeal.)

The following federal "firing" cases were brought under 42 U.S.C. 1983 as original actions and both applied the substantial evidence rule: *Duke vs. North Texas State,* 469 F.2d 829 (5th Cir. 1973), *cert. den.* 412 U.S. 932; *Green vs. Board of Regents,* 474 F.2d 94 (5th Cir. 1973). Both of these cases were cited to the courts below and, of course, there are many more such federal cases. *Board of Regents vs. Martine, supra,* was the only Texas Court case of this type petitioner could locate. It was cited below.

Petitioner points out that 42 U.S.C. 1983 creates no substantive rights. Although it "creates a cause of action

for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive right." Substantive rights come from the Constitution. *Garcia vs. Wilson*, 731 F.2d 640, *aff'd*, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). "This section provides no protection for civil rights since it does not provide any substantive rights at all." *Chapman vs. Houston Welfare Rights Organizations*, 59 S.Ct. 1905, 60 L.Ed.2d 508 (1979). "This section is remedial in nature and does not alone provide for any rights, substantive or othewise" . . . . *Miener vs. State of Missouri*, 673 F.2d 969, *cert. den.* 103 S.Ct. 215, 230, 74 L.Ed.2d 171, 182 (1982). These cases were also cited to the court below.

The Texas Supreme Court many years ago gave to persons allegedly deprived of their state or federal constitutional rights a cause of action to have such deprivation judicially determined, and if found to exist redressed judicially. *City of Amarillo vs. Hancock*, 239 S.W.2d 788 (Tex. 1951).

Under the foregoing authorities municipal employees (as well as other persons) have exactly the same rights of redress in Texas Courts for alleged constitutional deprivations whether they rely for their remedy upon 42 U.S.C. 1983 or rely for their remedy merely upon the "Hancock doctrine" of the State Supreme Court. The federal statute gives them a remedy: they can seek to prove federal violations in either federal or state Courts, and be awarded damages in either Court if they prove their case. The Texas Supreme Court, in *Hancock*, gave them the same right in Texas Courts. The cause of action and the pro-

cedure for prosecuting it are the same under either *Hancock* or 42 U.S.C. 1983.

In Texas, judicial review of "firing" decisions of government employees is conducted under the substantial evidence rule where the employee contends that his firing was unjustified because evidence was lacking to support such firing whether the review is by way of statutory appeal or by way of the *Hancock* doctrine. *Fire & Police Civil Service Comm. vs. Brinkmeyer*, 662 S.W.2d 953 (Tex. 1985); *Board of Regents vs. Martine*, 607 S.W.2d 638, error ref'd, no reversible error (1980).

Further, the question of whether an administrative decision is "arbitrary and capricious" is merely another way of inquiring if the decision was supported by substantial evidence. *Gerst vs. Guardian Savings*, 434 S.W. 2d 113 (Tex. 1968); *Texas Health Facilities Comm. vs. Charter Medical Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984). This is also true in the Federal Courts. *Duke vs. N. Tex. State, supra; Green vs. Board of Regents of Texas Tech., supra.*

Further, the substantial evidence question is one of law in both state and federal courts. *Southern Canal Co. vs. Board of Water Engineers*, 318 S.W.2d 619 (Tex. 1958); *Miss. Pub. Serv. Comm. vs. U.S.*, 124 F. Supp. 809, *aff. Ill. Cent. R.R. Co. vs. Miss. Pub. Serv. Comm.*, 349 U.S. 908, 99 L.Ed. 1244 (1955). Thus, neither the question of whether the administrative decision was "arbitrary and capricious" nor whether the decision was supported by substantial evidence should be submitted to the jury in Texas state courts because in such courts the jury decides *fact* questions, but *only* fact questions. *Cain vs. Tenn-La.*

Oil Co., 382 S.W.2d 794 (Tex.Civ.App.—Tyler 1964), *aff'd* 400 S.W.2d 318 (Tex. 1966).

If either question is submitted to the jury its answer will not support a judgment, even though the submission was not objected to. *McDonald, Texas Civil Practice*, sec. 12-27; *Jones vs. Winter*, 215 S.W.2d 654 (Tex.Civ.App.—Amarillo 1948, writ ref'd n.r.e.); *City of San Augustine vs. Roy Green Co.*, 548 S.W.2d 467 (Tex.Civ.App.—Tyler 1977, writ ref'd n.r.e.); *Leggio vs. Miller's Nat. Ins. Co.*, 398 S.W.2d 607 (Tex.Civ.App.—Tyler 1965, writ ref'd n.r.e.).

If the employee further contends that the procedure by which he was fired denied him due process, fact questions relating to such procedure should be submitted to the jury if the employee desires a jury, as in the case at bar. Rule 279, Texas Rules of Civil Procedure.

Upon appeal any ground of recovery upon which no issue is submitted or requested to be submitted to the jury shall be deemed as waived. Rule 279, Texas Rules of Civil Procedure.

The respondent in the case at bar failed to request any issue relating to the fact question of whether Heubner would have fired her if he had given her a new hearing or reviewed the whole record before the commission. Indeed, respondent failed to request any issues *at all*. Under *Carey vs. Piphus*, 55 L.Ed.2d 252, 435 U.S. 247 (1978) respondent thus failed to gain a determination that she sustained damage from Huebner's failures in this respect.

After all of the evidence was in and both sides had closed it was obvious that there was substantial evidence

to support Huebner's decision. In fact, undisputed evidence (from Canales and Campbell) supported such decision. However, it was also undisputed that Huebner neither reviewed the whole record before the commission nor gave the petitioner a new hearing. Nevertheless, it seemed obvious that, under Huebner's own testimony (mostly on cross-examination by respondent) if he had reviewed the testimony of Canales and Campbell before the commission or if he had held a new hearing he most assuredly would have fired the petitioner. This is because the reasons he gave for firing petitioner (which he found in the record before the commission) were minor compared with the testimony of Canales and Campbell, which testimony he was unaware of.

Under *Carey vs. Piphus, supra,* a denial of procedural due process (which petitioner concedes *arguendo* Huebner's above failures were) entitled respondent only to nominal damages, unless she could show that such denial caused her to be fired. Please see also *Wilson vs. Taylor,* 658 F.2d 1021 (5th Cir. 1981).

Respondent requested no jury issue, as stated above. Indeed, it seems so clear that Huebner would have fired her if he had known of the subject testimony, probably the submission of such issue would not have been jutified.

Under the foregoing fact recitation and authorities it seems clear that 42 U.S.C. 1983 does not change the substantive or procedural law in alleged constitutional violation cases and that in attacks upon administrative decisions brought under such statute the substantial evidence rule applies as to the reasonableness of the decision (whether it was arbitrary and capricious) as distinguished

from the procedure by which it was reached. If there are fact questions relating to procedural due process such questions should be decided by the jury, but the substantial evidence question is of *law.*

It should be noted further the same test applies in Texas state courts as in federal courts as to the quantum of proof required to constitute substantial evidence, viz., that reasonable persons could have reached the same result as the challenged decision under such evidence. *Fire & Police Civil Service Comm. vs. Brinkmeyer, supra;* 73A C.J.S., *Pub. Admin. Law and Procedure,* sec. 238.

However, the Texas rule varies from the federal rule in at least one respect: on judicial review the court is not concerned with whether the evidence relied upon in support of the administrative decision (Huebner's in our case) was *actually heard by the latter,* but rather the court is concerned with whether such evidence *was in existence* at the time of the contested decision. *R. R. Comm. vs. Shell Oil Co.,* 161 S.W.2d 1022 (Tex. 1942).

Because both Supreme Court opinions below run counter to the above authorities the two opinions are almost certain to result in confusion as to what rights 42 U.S.C. 1983 gives to Texas government employees who are allegedy fired in derogation of their federal constitutional rights.

The concurring opinion is particularly distressing to petitioner because, unlike the majority opinion which is murky and mistaken, it is clear and mistaken. It asserts (second paragraph) that "the City failed to attack the propriety of (respondent's) sec. 1983 claim, the evi-

dence supporting it, or the accompanying jury issue; these were not preserved for review by the City".

To this petitioner responds that there was no impropriety in petitioner's sec. 1983 claim: Huebner was acting pursuant to City policy, as reflected by its charter and personnel rules, in firing respondent without a new hearing and without reviewing the whole record before the commission. Under *Monell vs. New York City Dept. of Soc. Service,* 56 L.Ed.2d 611, 436 U.S. 658 (1978), this makes 42 U.S.C. 1983 applicable to the City.

Further, the respondent's evidence was not damaging to the petitioner on the question of substantial evidence, of which there was an abundance. Respondent offered no evidence on the procedural due process matter, except the true and admissible evidence that Huebner did not give her a new hearing nor review the entire commission record.

Lastly, the lack of materiality of the "accompanying jury issue" was called to the trial court's attention by way of motion for judgment N.O.V., supported by many of the above authorities, several days before judgment was rendered. The N.O.V. motion was summarily overruled.

At this point petitioner should explain its failure to object to the submission of this law question to the jury. The question was the idea of the trial judge, not the respondent, and neither the former nor the latter seemed to be aware that such "arbitrary and capricious" question was one of law, since respondent did not object to its submission either. If the jury had answered that Hueb-

ner's firing of respondent was not arbitrary and capricious petitioner likely would have been awarded judgment and this may well have ended the case. If the converse were true it could have been called to the court's attention by way of motion for judgment N.O.V. and if this failed (as it did) petitioner would have the error preserved for the appellate courts.

Of course, the latter eventuality occurred and the intermediate appellate court, in reversing the trial court's judgment and rendering judgment for the petitioner, held the law question to be unanswerable by the jury, whether objected to or not, and further held that the substantial evidence rule applied to the case and that there was substantial evidence to support Huebner's decision. On the question of procedural due process that court, relying upon *Board of Regents vs. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972), held that since the civil service rules were the basis of respondent's "vested property interest" in her job and that since these rules were complied with she received all the due process she was entitled to. (Petitioner had argued both the *Roth* and the *Piphus* propositions, as it did in the State Supreme Court).

The concurring opinion concludes with this statement: "the court's opinion should not be read as recognizing that a sec. 1983 cause of action arises each time a municipal employee is terminated." To this statement petitioner queries: "When *does* a sec. 1983 cause of action arise in such a case?" The answer, of course is "any time such employee claims federal constitutional violations with respect to City policy which results in such termination."

Such employee has to prove his case, however, and sec. 1983 does not change this.

One further observation should be made: both opinions seemed to assume (incorrectly) that the only liability question submitted to the jury, whether Huebner's firing respondent was "arbitrary and capricious", related to the *procedure* by which Huebner fired respondent (no rehearing, no review of all of the evidence before the commission). This proposition had never been raised and it is submitted that it is erroneous. But even if it be assumed that the subject of the question *was* the procedure of Huebner's firing her the question and the jury's answer thereto were immaterial because if respondent was constitutionally entitled to a new hearing before Huebner or a full review by him of the commission's record, his failure in this regard denied her procedural due process whether such failure was arbitrary and capricious or not.

What respondent needed was a determination that she would not have been fired if she had been given a new hearing or if Huebner had reviewed the whole record.

In either event, Huebner would have been apprised of the testimony of Canales and Campbell. Would this have helped respondent? Petitioner thinks not.

———o———

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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By: /s/ Steven W. Arronge
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APPENDIX I

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 16, 1987

Mr. James M. Heidelberg
Mendelsohn, Heidelberg, Longoria
& Beer, Inc.
1010 InterFirst Plaza
San Antonio TX 78205

Mr. Crawford B. Reeder
First Assistant City Attorney
P. O. Box 9066
San Antonio TX 78285

RE: Case No. C-5989

STYLE: JEAN ROSOW
v. CITY OF SAN ANTONIO

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

Mary M. Wakefield, Clerk

/s/ By Blanc E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

October 8, 1987

Mr. David J. Garcia
District Clerk
Bexar County Courthouse
San Antonio TX 78205

RE: Case No. C-5989

STYLE: JEAN ROSOW vs. CITY OF SAN ANTONIO
NO. 81-CI-10832 in the 225th District Court, Bexar County

Dear Mr. Garcia:

The judgment of the Supreme Court of Texas is now final in the above referenced cause. As Rule 186, Tex. R. App. P., has been satisfied, we have issued the mandate as of today.

Enclosed with the mandate is a certified copy of our cost bill showing charges and payments as reflected by the record for your use in settlement between the parties.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Peggy Littlefield
Peggy Littlefield, Longoria

cc.

Mr. James M. Heidelberg
Mendelsohn, Heidelberg, Longoria
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San Antonio TX 78285

APPENDIX II

THE STATE OF TEXAS

To the District Court of Bexar County, Greeting:

Before our Supreme Court on the 8th day of July A.D. 1987, the Cause, upon writ of error, to revise or reverse your judgment between

JEAN ROSOW vs. CITY OF SAN ANTONIO

No. C-5989 in the Supreme Court of Texas.

No. 81-CI-10832 in the District Court of Bexar (225th) County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"This cause was heard on writ of error from the Court of Appeals for the Thirteenth District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

"It is the opinion of the court, (Justice C. L. Ray, author; Justice Franklin S. Spears concurring joined by Justices James P. Wallace, Ted Z. Robertson, and Oscar H. Mauzy) there is error in the judgment of the court of appeals. The court of appeals disallowed the wrongful termination claim of a "classified" civil service employee under 42 U.S.C. § 1983 and reversed the trial court.

"In accordance with the opinion of this court, it is ordered that:

1) as the court of appeals erred in characterizing Rosow's § 1983 claim as an appeal from an administrative decision, the judgment of the court of appeals is reversed.

THE STATE OF TEXAS

To the District Court of Bexar County, Greeting:

Before our Supreme Court on the 8th day of July, A.D. 1987, the Cause, upon writ of error, to revise or reverse your judgment between JEAN ROSOW vs. CITY OF SAN ANTONIO.

No. C-5989 in the Supreme Court of Texas.

No. 81-CI-10832 in the District Court of Bexar (225th) County, Texas, was determined and therein our said Supreme Court entered its judgment or order in these words:

(Continued from Page 1)

2) The judgment of the trial court is affirmed.

3) The City of San Antonio shall pay and perform the judgment of the trial court.

4) The City of San Antonio shall pay the costs in this court and the court of appeals.

5) Jean Rosow shall recover her costs in those courts from the City of San Antonio.

"A copy of this judgment shall be certified to the District Court of Bexar County, Texas for observance."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Honorable JOHN L. HILL, Chief Justice of our said Supreme Court, with the seal thereof annexed, at the City of Austin, this the 8th day of October A.D. 1987.

MARY M. WAKEFIELD
Clerk

/s/ By Peggy Littlefield
Peggy Littlefield, Chief Deputy

IN THE SUPREME COURT OF TEXAS

NO. C-5989

JEAN ROSOW,	)	
	)	
Petitioner,	)	FROM BEXAR
	)	COUNTY
v.	)	
	)	THIRTEENTH
CITY OF SAN ANTONIO,	)	DISTRICT
	)	
Respondent.	)	

OPINION

This case involves a claim under 42 U.S.C. § 1983 for wrongful termination of a "classified" civil service employee. The trial court submitted the case to a jury which found that Jean Rosow had been dismissed from her job without due process. The court of appeals reversed and rendered a take-nothing judgment, holding that Rosow's cause of action was not based upon violations of her constitutional right to due process, but rather was a suit for judicial review of an administrative decision. 716 S.W.

2d 633. The court of appeals disallowed the § 1983 claim and reversed the trial court concluding that substantial evidence supported the decision to discharge Rosow from employment. We hold that the court of appeals erred in characterizing Rosow's § 1983 claim as an appeal from an administrative decision and accordingly reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Jean Rosow was hired by the City of San Antonio in April, 1972, and subsequently attained classified civil service status. At the time of her termination she had been promoted to the position of "Administrative Assistant V." In March 1980, Rosow's supervisor was fired by the City Manager, Thomas Heubner. Four days later Rosow was told by her new supervisor, Lou Fox, to clean out her desk and find another job with a different City department within thirty days. One month later Fox advised Rosow over the phone that she had been dismissed from City employment, Rosow then requested written notice of her termination and a statement of the reasons for her termination. The City finally gave adequate notice on May 15, 1980, alleging incompetency, discourtesy to fellow employees, and conduct prejudicial to good order. Rosow appealed her termination to the Municipal Civil Service Commission.

The Civil Service Commission conducted three days of hearings that resulted in a unanimous recommendation that Rosow be reinstated to her position. The Commission's recommendation included the statement that it "was particularly distressed by the process by which Ms. Rosow was dismissed." Finally, the Commission requested a con-

ference with City Manager Huebner, who received the recommendation and was responsible for making a final decision. However, Huebner did not grant the Commission's request for a conference to discuss the recommendation but instead disregarded the Commission's recommendation and, without considering all of the evidence, terminated Rosow.

Rosow then filed suit claiming that the City's actions in terminating her employment violated rights afforded her under both the state and federal constitutions. The case was tried before a jury which found that the City's termination of Rosow was "arbitrary and capricious" because such action was taken "without consideration of the facts . . . " The jury awarded Rosow $150,000.00 in damages. Judgment was rendered for that amount plus prejudgment interest and attorneys' fees and the City was ordered to reinstate Rosow to a position of like status and pay. The judgment also stated that "substantial evidence did not exist to terminate the employment of Jean Rosow . . . ."

In its Motion to Disregard Jury Findings and to Enter Judgment N.O.V. for the Defendant, the City contended that the trial court had erred by submitting Issue No. 1 to the jury because the question of whether there was substantial evidence to support Huebner's decision is a question of law and that as a matter of law there was substantial evidence to support such decision. The trial court overruled the City's Motion.

Although the court of appeals conceded that Rosow "clearly had a vested property right in her job," it concluded that her claim was an appeal from an administra-

tive action and therefore reviewable under the substantial evidence rule. 716 S.W.2d at 635. The court of appeals held that the trial court had improperly submitted the case to the jury and that "[a]lthough the City did not object to the submission of this question of law to the jury, we find that the jury's finding on such an issue is immaterial and cannot, as a matter of law, be the basis of a judgment." *Id.* at 637. The court of appeals then reviewed the record and determined that substantial evidence existed to support Huebner's decision to terminate Rosow. The judgment of the trial court was reversed and judgment was rendered that Rosow take nothing.

Rosow contends that the court of appeals erred in characterizing her cause of action as an appeal from an administrative action and that in doing so denied her the right to trial by jury on her constitutional claims. We agree. Because the court of appeals characterized Rosow's claim as an administrative appeal, it reviewed the case only to determine whether substantial evidence supported Huebner's decision to remove Rosow, giving no weight to the jury's finding that the Huebner acted arbitrarily and capriciously. The gravamen of Rosow's complaint was that she was denied procedural due process because she was not afforded an opportunity to present her side of the evidence before the ultimate decision maker, Huebner. Her pleadings frame the cause of action as an original action based on an unconstitutional deprivation actionable under 42 U.S.C. § 1983. Testimony developed during trial in support of her § 1983 claim was received without objection by the City. Indeed, the record before us demonstrates that no objections were made by the City to either the pleadings, the evidence or the issue and instructions

submitted to the jury and that the City first complained or gave notice of its contentions in its Motion for Judgment N.O.V.

As conceded by the City and the court of appeals, Rosow had a vested property right in her job and an expectation of continued employment as long as she did not violate the Civil Service Rules governing removal of "classified" employees. 716 S.W.2d 635 (*citing Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983); *and Davis v. Nuss*, 432 F. Supp. 44 (S.D. Tex. 1977)). Rosow was unquestionably deprived of that property right which she contended was effected in violation of her right to procedural due process.

The court of appeals, in concluding that Rosow's claim was in "substance" a suit for review of an administrative decision, incorrectly relied on *Martine v. Board of Regents*, 578 S.W.2d 465 (Tex. Civ. App.—Tyler 1979), *appeal after remand*, 607 S.W.2d 638 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). *Martine* is distinguishable from the case at hand. Although *Martine* also involved a wrongful termination claim, the cause of action was primarily a suit for judicial review of an administrative agency decision in which the claimant sought reinstatement to his former position rather than damages. *Id.* at 474. The court in *Martine* noted that:

> [A]ppellant has alleged no discriminatory or unreasonable conduct by the Board; neither has he made any allegations that the Board acted in bad faith, for a constitutionally impermissible reason, or beyond the authority granted it by statute—except to allege that he should be accorded the right to judicial review of

the determination made by the Board to dismiss him. *Id.*

Additionally, appellant's counsel in *Martine* stated in oral argument that what appellant is " 'basically trying to get out of this lawsuit is judicial review of [the] decision by appellees to fire him.' " *Id.* The § 1983 claim was admittedly " 'an alternate cause of action that we threw in.' " *Id.* The basis for the court of appeal's holding in *Martine* was that the appellant's suit was not brought "to secure redress for some asserted deprivation of constitutional rights per se, but rather is plainly to secure judicial review of an administrative agency decision." *Id.*

The present case was clearly developed as a § 1983 case. *See Davis v. West Community Hospital,* 755 F.2d 455, 462-64 (5th Cir. 1985). The jury found that the City Manager's decision to terminate Rosow was "arbitrary and capricious" and was made without consideration of the facts. In addition to reinstatement, Rosow sought and was awarded damages and attorney's fees pursuant to her § 1983 claim. Thus, the court of appeals erred in characterizing Rosow's suit as an administrative appeal and in failing to review this case as a § 1983 claim. However, because the City has failed to preserve the right to complain of the trial court's judgment based on Rosow's § 1983 claim, such judgment must stand.

We therefore reverse the judgment of the court of appeals and affirm the judgment of the trial court.

.....

C. L. Ray,
Justice

OPINION DELIVERED: July 8, 1987

Concurring opinion by Justice Spears joined by Justices Wallace, Robertson and Mauzy.

IN THE SUPREME COURT OF TEXAS

NO. C-5989

JEAN ROSOW Petitioner,	§	
	§	FROM BEXAR COUNTY
v.	§	
	§	THIRTEENTH DISTRICT
CITY OF SAN ANTONIO, Respondent.	§	

CONCURRING OPINION

I concur in the majority's opinion. The court of appeals erred in holding that Rosow's suit was, in substance, a suit for review of an administrative decision requiring the application of the substantial evidence rule. Rosow pleaded her case under 42 U.S.C. § 1983 and presented evidence in support of that claim. The jury found for Rosow on her § 1983 issue. The City failed to object to any of these actions.

I concur in affirming the judgment of the trial court solely because the City failed to attack the issues of the propriety of her § 1983 claim, the evidence supporting it, or the accompanying jury issue; these were not preserved for review by the City.

The court's opinion should not be read as recognizing that a § 1983 cause of action arises each time a municipal employee is terminated.

.....

Franklin Spears
Justice

Justices Wallace, Robertson and Mauzy join in this concurring opinion.

OPINION DELIVERED: July 8, 1987

NO. C-5989	)	
	)	
JEAN ROSOW	)	
	)	
Petitioner	)	
vs.	)	From Bexar County,
	)	Thirteenth District
CITY OF SAN ANTONIO	)	
	)	
Respondent	)	

This cause was heard on writ of error from the Court of Appeals for the Thirteenth District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

It is the opinion of the court, (Justice C. L. Ray, author; Justice Franklin S. Spears concurring joined by Justices James P. Wallace, Ted Z. Robertson, and Oscar H. Mauzy) there is error in the judgment of the court of appeals. The court of appeals disallowed the wrongful termination claim of a "classified" civil service employee under 42 U.S.C. § 1983 and reversed the trial court.

In accordance with the opinion of this court, it is ordered that:

1) As the court of appeals erred in characterizing Rosow's § 1983 claim as an appeal from an administrative decision, the judgment of the court of appeals is reversed.

2) The judgment of the trial court is affirmed.

3) The City of San Antonio shall pay and perform the judgment of the trial court.

4) The City of San Antonio shall pay the costs in this court and the court of appeals.

5) Jean Rosow shall recover her costs in those courts from the City of San Antonio.

A copy of this judgment shall be certified to the District Court of Bexar County, Texas for observance.

(Opinion by Justice Ray)

(Concurring opinion by Justice Spears)

APPENDIX III

COURT OF APPEALS

Thirteenth Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 29th day of August, 1986. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-86-086-CV (Tr. Ct. No. 81-CI-1083?)

CITY OF SAN ANTONIO, Appellant

V.

JEAN ROSOW Appellee

on appeal to this Court from Bexar County, Texas.

* * * * * * * * *

J U D G M E N T

On appeal from a judgment of the 225th District Court of Bexar County, Texas, signed June 19, 1985. Opinion by Justice Norman L. Utter. Opinion ordered published. Tex. R. Civ. P. 452.

THIS CAUSE was submitted to the Court on March 26, 1986, on oral argument; the record and briefs. These having been examined and fully considered, it is the opinion

of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED and RENDERED that appellee take nothing. Costs of the appeal are adjudged against appellee, Jean Rosow. It is further ordered that this decision be certified below for observance.

* * * * * * *

BETH A. GRAY, CLERK

NUMBER 13-86-086-CV

COURT OF APPEALS

THIRTEENTH JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * * * *

CITY OF SAN ANTONIO, APPELLANT,

v.

JEAN ROSOW, APPELLEE.

* * * * * * *

On appeal from the 225th District Court
of Bexar County, Texas

* * * * * * *

Before Norman L. Utter, J.; Paul W. Nye, C. J.;
and Robert J. Seerden, J.

* * * * * * *

OPINION

The City of San Antonio appeals from a jury verdict which found that appellee was "arbitrarily and capriciously" terminated from her job. The jury awarded her $237,335.70. The trial court ordered the City to reinstate appellee "to a position of like status and pay." We reverse and render the judgment of the trial court.

Appellee was employed by the City as an "Administrative Assistant V." This was a "classified" civil service position. On May 15, 1980, Mr. Fox, appellee's supervisor, gave appellee written notice of termination, in compliance with the Municipal Civil Service Rules of San Antonio. Reasons given for her termination were, "acts of incompetency, discourtesy by said employee to the public or to fellow employees . . . and conduct prejudicial to good order. . . ." Pursuant to the Civil Service Rules, appellee appealed her termination to the Municipal Civil Service Commission. Section 3 of the Municipal Civil Service Rules of the City of San Antonio provides:

> Any employee in the Classified Service may be suspended, demoted, or removed by the City Manager or officer having authority to appoint. Written notice of suspension, demotion or removal, stating the reasons therefor and when it is effective, shall be given to such person or sent by registered or certified mail to the employee's usual place of residence. Such person, within ten (10) working days after the receipt of such notice, may appeal in writing to the Commission for a hearing. . . . Within forty-eight (48) hours after the completion of the public hearing, the Commission shall report its findings and recommendations to the City Manager, whose action shall be final.

A hearing was held, resulting in the Commission recommending that the City Manager reinstate her. The City Manager disregarded the Commission's recommendation and approved the termination of appellee.

Appellee filed this suit alleging, *inter alia*, that her termination was "arbitrary, capricious, an abuse of discretion and a violation of the San Antonio City Charter and the [Civil Service] Rules." She further contends that she was denied her right to due process.

Appellee contends that this case is not "in the nature of a judicial review of an administrative decision," but rather was a suit for the violation of her "state and federal constitutional rights to due process, liberty, and free speech." We disagree with appellee's characterization of the nature of this case. As has often been said, we must look through form to substance in order to determine the true nature of the cause of action. No matter what label is applied, appellee cannot escape the inevitable conclusion that what she sought by her suit was in fact a review of her termination, reinstatement, and back pay. *See* Martine v. Board of Regents, 578 S.D.2d 465, 474 (Tex. Civ. App.—Tyler 1979), *appeal after remand,* 607 S.W.2d 638 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

The right to appeal from an action of an administrative party or an appeals board exists only where expressly provided for by statute or ordinance, or where the administrative action complained of violates a constitutional right or deprives one of a vested property right. City of Amarillo v. Hancock, 239 S.W.2d 788 (Tex. 1951); McFad-

den v. Gideon, 639 S.W.2d 43 (Tex. App.—El Paso 1982, writ ref'd n.r.e.).

There are no provisions in the Civil Service Rules nor in the City Charter for judicial review of the City Manager's decision to terminate a "classified" civil servant. However, appellee did allege, in her Sixth Amended Original Petition, that the Civil Service Rules and the City Charter created in her an expectation of continued employment sufficient to constitute a vested property right. Appellee clearly had a vested property right in her job. The Civil Service Rules set forth eighteen grounds for removal. As long as appellee did not violate any of those enumerated provisions, she had an expectation of continued employment. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Bueno v. City of Donna, 714 F.2d 484 (5th Cir. 1983); Davis v. Nuss, 432 F.Supp. 44 (S.D. Tex. 1977). Since appellee was deprived of a vested property right by administrative action, she has an "inherent right" to judicial review. Martine v. Board of Regents, 578 S.W.2d at 472. We therefore determine that the nature of this case is that of an appeal from an administrative action, and that appellee had the right to appeal.

The administrative action for review before the trial court, as well as this Court, is the decision of the City Manager to approve the termination of appellee's employment, not the recommendation to reinstate her made by the Civil Service Commission.

By its second point of error, the City alleges that the trial court erred in holding that there was no substantial evidence to support the decision by the City Manager to approve the discharge of appellee from her employment.

Judicial review of administrative actions is governed by the substantial evidence rule. Martine v. Board of Regents, 578 S.W.2d at 473. *See also* Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W. 2d 446, 452 (Tex. 1984); Firemen's and Policemen's Civil Service Commission v. Brinkmeyer, 662 S.W.2d 953, 955-56 (Tex. 1984).

The substantial evidence rule is a method of judicial review designed to "keep the courts out of" the decisions of administrative agencies, but still insure that "justice is administered" to those affected by the agency decisions. *See* Lewis v. Metropolitan Savings and Loan Ass'n, 550 S.W.2d 11 (Tex. 1977). It is the duty of the court to determine, based on the record made in the trial court, whether there was in existence at the time of the administrative action, evidence of a substantial nature reasonably supporting the order. Mercer v. Ross, 701 S.W.2d 830 (Tex. 1986); Firemen's and Policemen's Civil Service Commission v. Brinkmeyer, 662 S.D.2d at 956; Heard v. Incalcaterra, 702 S.W.2d 272 (Tex. App.—Houston [1st Dist.] 1985, no writ). In this case, we are to determine whether the City Manager's decision is supported by substantial evidence in the record viewed as a whole. *See* Texas Alcoholic Beverage Commission v. Wines of Germany and the World, Inc., 691 S.W.2d 817 (Tex App.—Houston [1st Dist.] 1985, no writ); Board of Regents v. Martine, 607 S.W.2d at 640.

The Supreme Court has summarized the criteria applicable to a review under the substantial evidence rule as follows:

> In applying the test, the court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion.
>
> Although substantial evidence is more than a mere scintilla, the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency. Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action.
>
> The findings, inferences, conclusions and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise. Hence, if there is evidence to support either affirmative or negative findings on a specific matter, the decision of the agency must be upheld.

Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W.2d at 452-3.

The issue before the trial court, whether the administrative action is reasonably supported by substantial evidence, is strictly one of law. Firemen's and Policemen's Civil Service Commission v. Brinkmeyer, 662 S.W.2d at 956; Martine v. Board of Regents, 578 S.W.2d at 473. Due to a failure to correctly characterize this case as an appeal from an administrative action governed by the substantial evidence rule, the following special issue was submitted to a jury:

> Do you find from a preponderance of the evidence that [the City Manager] acted *arbitrarily and capriciously* in terminating the employment of Plaintiff, Jean Rosow? [emphasis ours]

Our Supreme Court has discussed the meaning of "arbitrary and capricious" action as it relates to the substantial evidence rule:

> Throughout the long history of the substantial evidence rule the existence of substantial evidence has been equated with fair and reasonable conduct on the part of the agency. Conversely, agency decisions that are unsupported by substantial evidence have been deemed arbitrary and capricious. Thus, the two terms have many times been considered two sides of the same coin.

Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W.2d at 454.

The Supreme Court noted one instance where an agency's action could be supported by substantial evidence and nonetheless be arbitrary and capricious. That instance occurs "when a denial of due process has resulted in the prejudice of substantial rights of a litigant." *Id.* In her pleadings, appellee contends that she was denied due process by the City Manager's "disapproval" of the Civil Service Commission's recommendation. She does not assert that she was denied due process at the hearing before the Civil Service Commission. Nor would such a contention be meritorious. The Civil Service Rules and the City Charter provide that the Civil Service Commission has "the power to administer oaths and affirmations, and to compel the attendance of witnesses and other persons by subpoena . . . and to compel the production of all pertinent records." At the hearing, "the appellant shall have the

right to appear and be heard in person or by counsel." Appellee states in her brief that the hearing lasted for three days "at which time all evidence relating to her alleged misconduct was presented to the Commission." Appellee was afforded all that due process requires at the hearing. *See* Board of Regents v. Roth, 408 U.S. 564, (1972); Jordan v. City of Lake Oswego, 734 F.2d 1374 (9th Cir. 1984); Bueno v. City of Donna, 714 F.2d 484 (5th Cir. 1983).

In the instant case, we find that the trial court improperly submitted to the jury the only question to be decided; *i.e.*, whether the City Manager's decision was supported by substantial evidence, or put another way, whether that decision was arbitrary and capricious. This was a question of law for the trial court. Although the City did not object to the submission of this question of law to the jury, we find that the jury's finding on such an issue is immaterial and cannot, as a matter of law, be the basis of a judgment. *See generally*, City of San Augustine v. Roy W. Green Co., 548 S.W.2d 467 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); Leggio v. Millers National Insurance Co., 398 S.W.2d 607 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); A. A. A. Realty Co. v. Neece, 314 S.W.2d 384 (Tex. Civ. App.—Fort Worth 1958), *rev'd on other grounds*, 322 SW.2d 597 (Tex. 1959); Jones v. Winter, 215 S.W.2d 654 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

In any event, the trial court made an independent finding that "substantial evidence did not exist to terminate the employment of Jean Rosow." That finding is properly before us and is subject to review under the criteria previously set forth.

Appellee was terminated for alleged acts of incompetency, discourtesy to the public or to a fellow employee, and conduct prejudicial to good order. The record reveals four distinct bases upon which the City Manager could have decided to approve appellee's termination. The four bases are: (1) certain acts of discourtesy to Amerigo Canales, an employee under appellee's direct supervision; (2) general complaints from various employees regarding appellee's "behavior as a supervisor"; (3) a problem concerning access to the petty cash fund; and, (4) the relationship between appellee, Robert Hunter, the Planning Director, and Al Eisenmenger, the Assistant Planning Director. Our duty is to review the record to determine whether the trial court erred in finding that the City Manager did not have substantial evidence upon which to base his decision to terminate appellee's employment.

Thomas Huebner was the City Manager at the time of appellee's termination. He had been City Manager since 1977. Between 1978 and 1979, Huebner became aware of an "uncommon number of problems relating to the Planning Department." Huebner testified, "It was an unusual situation and a serious one, and one in which in discussion with my assistants and several department heads, we concluded that we ought to try what is called organizational development in an effort to solve the problems that existed in that department." An "organizational development survey" was conducted upon the employees in the Planning Department which indicated generally poor morale and a dissatisfaction with the supervisors. This survey was introduced in evidence and was identified by Huebner as a portion of the record upon which he based his decision to terminate appellee. For nearly a year, Huebner worked

with Hunter and the Planning Department in an effort to solve the problems there.

Huebner further testified that:

> We [the Assistant Manager, Lou Fox, and Leroy Harvey, the Personnel Director, and Huebner] discussed the progress of the organizational development in the Planning Department. And, again, I think this is in my deposition, at one point after a few months we thought we were making headway and things were getting better, and then after another three, four or five months, it was fairly obvious that we had a most serious problem and it was not being resolved.

During this time, Huebner received complaints from eight Planning Department employees "that came to see [him] because of their problems within the Department—all of the complaints stem back to three people, Bob Hunter, Al Eisenmenger and Jean Rosow." Eventually, Huebner determined that it was necessary to remove Hunter from the position of department head.

Canales, one of the employees who complained to Huebner, held the position of Administrator I in the Planning Department and appellee was his immediate supervisor. Canales testified that appellee "was always monitoring my time." He said that she asked him to maintain a detailed list of his daily activities, even "the time that I . . . go to the restroom and say how long I stay in the restroom." He said that he was caught in the familiar trap of "too many chiefs and not enough Indians." Once, because of multiple assignments from different "chiefs," Canales was late in completing an assignment for appellee and was reprimanded.

Canales also related an incident where a co-worker asked Canales to assist him with an assignment. Canales told him that he was busy with a job for appellee and couldn't abandon it without her permission. The co-worker then said, "well, if you don't want to do it just go to hell." Canales went to appellee and explained what had happened, whereupon appellee told Canales that he just "had to take it." He said that he felt that there was no point in going to Mr. Hunter with a complaint about appellee because "he always would take Mrs. Rosow's side."

Another incident involved a memorandum from appellee to Canales. Appellee had requested that Canales prepare a written summary of his job description. When Canales had not completed the assignment by the time appellee felt it should be done, appellee sent a memo to him. Appellee stated in the memo:

> I have attempted to write a job procedure describing the primary activities of attendance records processing. Although I am not as intimately involved with these activities as you are, I am generally familiar with the process. So I sat down and wrote my thoughts when I had a few spare moments. Attached is a copy of the procedure I developed. It took me 10 minutes to write this. I wrote it while waiting for a seminar to start. I realize that you cannot be expected to produce a document as quickly as I, but I do think that an Administrative Assistant I, being more familiar with the process, should be able to produce a reasonable document in at most four (4) times the amount of time it could take me—40 minutes. Thus, I think it is reasonable for me to expect you to be able to produce at least a limited job procedure in about 40 minutes.
>
> I realize that you have had many duties and tasks in the 11 work days since the assignment was made. You have also been out sick for three (3) days. However,

> you have also asked for and received an hour of compensatory time, for personal business and one hour of time to go to CETA offices and have been observed by me on several occasions as not being particularly busy. It is my opinion that in the eight (8) days you have been at work since the assignment, you could have found 40 minutes to complete an assignment. Therefore, I can only conclude that you have chosen not to complete the assignment without discussing the decision with me.

Canales testified that this memo humiliated him. Huebner testified that this memo "is an example of a supervisory attitude that I think is intolerable. You do not elicit support and cooperation of rank and file employees by belittling them, and I consider that memorandum abusing the employee."

Earl Campbell was an accountant with the Planning Department. His office was across the hall from appellee's office. He testified that he witnessed an unspecified number of "occasions" in which it was obvious that Canales was "being chewed out" by appellee in the presence of at least one other employee.

Campbell also related an incident with the petty cash fund. He was responsible for maintenance of the fund. Campbell testified that one time a package was delivered to appellee at the office, and the receptionist told Campbell to pay for the package out of petty cash ($8.97). The package turned out to be printed labels for her personal use. Appellee reimbursed the fund the next day.

Prior to this incident, Campbell became aware of a practice of appellee and the executive secretary going into the petty cash fund to make purchases when he was absent.

He pointed this out in a memo to the internal auditor, explaining that "no one is to have access to petty cash unless expressly authorized in writing by the Department Director to the Director of Finance." Two days later, Hunter authorized appellee to have access to the petty cash fund.

Huebner related the importance of the petty cash incident as follows:

> Well, I think if you review the record and for instance her treatment of Amerigo Canales on failing to get an assignment done on time, something—she was something of being a stickler for the rules, and yet in this instance the rules were violated and after it was brought to the appropriate authorities[']attention, then the Department Head sent a memo saying yes, she is authorized to make use of the petty cash fund, which is indicitive of the relationship that she had with the Department Head, and I think shows one attitude towards the rules with respect to herself, and another towards the other employees.

Huebner further testified that he viewed appellee as "a person with a double standard."

Louis Fox was appointed as acting Planning Director after Hunter was dismissed. Fox testified that many of the Planning Department employees "were real disturbed" that appellee had not also been dismissed along with Hunter. Fox met with appellee and told her that "men and women were complaining about her presence, that they didn't trust her. They felt that she had been the person that Bob Hunter used to do 'dirty work' in this department, and that she was causing a lot of problems," and while Fox was Assistant City Manager, several Planning

Department employees came to him with complaints about Hunter, appellee and Eisenmenger.

Huebner said that Eisenmenger's "performance changed dramatically when Bob Hunter was dismissed. He no longer was a problem that people were complaining about prior to Hunter's dismissal."

One of the findings of the Civil Service Commission was that, "[t]he procedures for dismissal of Mrs. Rosow did not follow from a steady progression of counseling and reprimands." Hunter was appellee's supervisor. Any disciplinary action directed toward appellee would have had to come from him. In this regard, Huebner testified as follows:

> The obvious . . . point there is that her supervisor was Bob Hunter, a department head who I had fired because of his totally unacceptable style of management, and she was carrying out for him his directives as department head. Of course there would be nothing in her record under Bob Hunter that said there was anything wrong with her, and in fact, I would imagine it's very laudatory.

Portions of the evidence which we have set forth above are sufficient to infer that appellee and Hunter, as well as possibly Eisenmenger and the executive secretary, were involved in what could be called a "mutual admiration society," thus plausibly explaining the lack of progressive disciplinary action in appellee's personnel file.

Again, under the substantial evidence standard of review, we are not to substitute our judgment for that of the agency as to the *weight* of the evidence, nor are we concerned with whether the agency reached the *correct* conclusion. Further, even though the evidence may pre-

ponderate *against* the agency's action, the agency's decision must be upheld if reasonable minds *could* have reached that decison. Texas Health Facilities Commission v. Charter Medical-Dallas Inc., 665 S.W.2d at 453. We therefore hold that, under the standard of review which we are required to apply, there exists substantial evidence to uphold the decision of the City Manager to terminate appellee's employment. Point of error number two is sustained.

Due to the disposition of the City's second point of error, it is unnecessary to address its remaining points. TEX. R. CIV. P. 451. The judgment of the trial court is REVERSED and RENDERED that appellee take nothing.

NORMAN L. UTTER
Justice

Opinion ordered published.
Tex. R. Civ. P. 452.

Opinion delivered and filed this
the 29th day of August, 1986.

APPENDIX IV

NO. 81-CI-10832

JEAN ROSOW	)	IN THE DISTRICT COURT
VS.	)	225TH JUDICIAL DISTRICT
CITY OF SAN ANTONIO	)	BEXAR COUNTY, TEXAS

FINAL JUDGMENT

On the 29th day of April, 1985, came to be heard the above-entitled and numbered cause for trial on the merits, and the parties, by and through their respective counsel, announced ready for trial, and a jury having been previously demanded, a jury consisting of twelve (12) good and lawful jurors, was duly empanelled and the case proceeded to trial.

At the conclusion of the evidence, the court submitted the case to the jury on special issues. The charge of the court, including the special issues, and the verdict of the jury are incorporated herein for all purposes by reference. It appearing to the court that the verdict of the jury was for the Plaintiff, JEAN ROSOW, and against the Defendant, CITY OF SAN ANTONIO, judgment should be rendered upon the verdict in favor of Plaintiff and against the Defendant. Furthermore, it is the conclusion of the court that substantial evidence did not exist to terminate the employment of JEAN ROSOW and, accordingly, the court further concludes that the relief contained in this Final Judgment is appropriate and shall constitute the judgment of this court.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that JEAN ROSOW have and recover from the CITY OF SAN ANTONIO the sum of TWO HUNDRED AND THIRTY-SEVEN THOUSAND THREE HUNDRED THIRTY-FIVE AND 90/100 DOLLARS ($237,335.90) which includes the amount of the verdict rendered by the jury with a calculation for prejudgment interest.

It is further ORDERED that JEAN ROSOW have and recover from the CITY OF SAN ANTONIO attorneys' fees in the sum of ($21,121.60) for services rendered through the trial of this case.

It is further ORDERED that this amount of attorneys' fees is taxed as part of the cost of the Court.

In the event this case is appealed to the Court of Appeals, then Plaintiff shall be entitled to an additional sum of attorneys' fees of TWELVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($12,500). In the event this case is appealed to the Texas Supreme Court, the Plaintiff shall be entitled to judgment for an additional sum of attorneys' fees of SEVEN THOUSAND DOLLARS ($7,000). In the event an Application for Writ of Error is granted in the Texas Supreme Court, then Plaintiff shall be entitled to an additional sum of attorneys' fees of THREE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($3.500.00).

It is further ORDERED that the Defendant, CITY OF SAN ANTONIO, reinstate Plaintiff, JEAN ROSOW, to a position of like status and pay to that of Administrative Assistant Level V and such employment to commence from the date of signing of this judgment.

All costs of Court expended or incurred in this case are hereby adjudged against Defendant, CITY OF SAN ANTONIO.

It is further ORDERED that the Judgment hereby rendered shall bear interest at the rate of ten (10%) from the ..... day of ....., 1985 until paid.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff shall have all writs and process necessary for enforcement of this Judgment. All relief not specifically granted herein is denied.

SIGNED this 19 day of June, 1985.

.....
JUDGE PRESIDING

APPROVED AS TO FORM:

MENDELSOHN, HEIDELBERG & BEER, INC

By: /s/ James M. Heidelberg
1010 InterFirst Plaza
San Antonio, TX 78205
(512) 222-2271
State Bar No. 09378000

ATTORNEYS FOR PLAINTIFF

CITY OF SAN ANTONIO

By: .....
David B. Casas, Esq.
ATTORNEY FOR DEFENDANT,
CITY OF SAN ANTONIO

APPENDIX V

The Evidence

The Appellee's evidence consisted of the testimony of the Appellee, Jean Rosow, and her husband, David Rosow, plus four (4) witnesses and some forty (40) exhibits. The Appellant's evidence consisted of the testimony of four (4) witnesses and two (2) exhibits.

The substance of the Jean Rosow's direct testimony (SF 31-115) follows:

She graduated from high school in La Grange, Illinoise in 1962 with good grades. She especially liked, and was good at, art and languages. She had one brother and two sisters and went to Sunday school. Her parents were instrumental in her making good grades and going to college. She graduated from Northern Illinois University in 1966, majoring in languages and minoring in art.

She married David in 1966.

Her first job was for a University of Nebraska Urban Planning professor. She helped him compile reports on Urban Planning in 1966-67.

From 1967 to 1969 she worked for NASA in Houston as a technical writer, where her husband also worked.

From 1969 to 1971 she and her husband were in New Mexico, where she did technical writing for a missile testing company. Her husband did computer analysis on missiles.

Her husband lost his job in 1971 because the aerospace industry was in a slump and they moved to San

Antonio (his home) where he went to St. Mary's University and she applied for and received a job with the City Planning Department in 1972.

When she was hired she was briefed on the provisions in the Civil Service System and told of the fringe benefits (health insurance, leave time, retirement, etc.). These were important to her because she was the wage earner at that time (1972).

Her position was "Junior Planner" and this was the lowest grade of planner. She helped compile reports and did some designing of covers for the reports.

She remained a Junior Planner for three (3) years. During all of this time she had no supervisory duties.

When a new Director (Bob Hunter) took over the Planning Department in 1976 he switched her from working for planners to administration "since I was the person that could write things and edit things and put them all together."

Her job title was changed in 1977 from Junior Planner to Administrative Assistant and she worked full time on administrative activities from then on. This involved supervising clerical people, the accountant, and the secretary. She was directly under Bob Hunter from 1977 until he was fired in 1980.

She was taught by Bob Hunter to document the notable things that her subordinates did whether such things were good or bad.

She also supervised a "couple of runner-type clerks that did a lot of miscellaneous work for us".

Bob Hunter (Director) never criticized her on her work from the time he met her until the time he was fired (1976-1980).

All of the time that she worked directly for Bob Hunter she was an Administrator V, the highest level administrator in the Civil Service System. She made the jump from Planner directly to Administrator V.

As a Junior Planner she always got good efficiency ratings and as Administrator V she always got even better ratings. This is based upon P's Ex #2 and 3 introduced by Appellee without objection. Ex 2 and 3 were elicited from Appellee's personnel records. They consist of a number of efficiency rating sheets by Bob Hunter giving her the highest marks and several memos from Hunter to her lauding her performance.

There are also three (3) Certificates of Completion of "training" programs and seminars (lasting one day each). There is also a letter from Louis J. Fox commending Appellee and other members of a City government-wide committee on Employee Appraisal. Further there are several laudatory memos from City officials to Appellee and vice versa and one such from a Bill Sinkin about welcoming a Guatemalan envoy of some sort.

She wrote lots of memos for Bob Hunter to other City officials telling them what a good job they were doing. This is reflected by some of the Appellee's 40-odd exhibits, all introduced without objection.

Exhibits 4 through 27 consist of a wide variety of matters such as Civil Service Rules, Personnel Department memos dealing with supervisory techniques, memos

from Appellee to third persons, mostly department heads, telling them how good they or their programs or subordinates are, similar memos over Bob Hunter's signature but written by Appellee, memos from a former City Manager on how to counsel and evaluate employees, procedure for taking recreational leave, how EEO works, a memo over Bob Hunter's signature, but written by Appellee, on how to order office supplies, and so on.

Exhibit #28 consists of 77 pages, the first 49 of which comprise a questionaire sent by the City Manager's office to each employee in the Planning Department. The purpose of this "survey", as it was called by the City Manager (Tom Huebner) in a covering memo (which is the first page of Exhibit 28) was to find out what kind of job the Planning Department was doing and how its employees felt about their jobs. More will be said about this portion of Exhibit 28 later herein. Pages 50 through 59 are various forms signed by Jean Rosow as department head. (This shows that she did some of Director Bob Hunter's work). Page 60 is a memo from Appellee to Americo Canales, one of her subordinates, telling him that a position that he wanted to apply for was not available due to an administrative error. Page 61 and 62 are a memo from Appellee to Americo Canales, upbraiding him for his failure to write out a "job procedure" for his position. More will be said about this memo later. Pages 63 and 64 are the "job procedure" written by Appellee, alluded to in her above memo to Mr. Canales. Pages 65 and 66 are another memo from Appellee to Mr. Canales about job scheduling. Page 67 is a request by Mr. Canales that Rosemary Lawson, Planning Department secretary, check with Appellee before ordering Mr. Canales to perform the task

of xeroxing 235 pages of documents. Page 69 is a record of Appellee's "counseling" Canales to take orders from Ms. Lawson. Page 68 is a memo from Mr. Canales to Appellee contesting the latter's counselling report (Page 69) and requesting a copy of the note written by Ms. Lawson which precipitated the counselling. Page 70 is a memo to a City Auditor from Earl Campbell, Department Accountant and subordinate of Appellee, stating that it was a "habit of Jean Rosow and Rosemary Lawson to go into the petty cash box and make purchases when I am absent. I do not think this is an acceptable practice and it makes it difficult to maintain the petty cash fund properly. To my knowledge, neither party has been authorized to do this, but when I question Mrs. Rosow she said she is authorized. I would appreciate your opinion on this matter." Page 71 is the auditor's reply to Mr. Campbell stating, in effect, that neither Jean Rosow nor Rosemary Lawson was authorized to withdraw petty cash. Page 72 is a memo from Bob Hunter to the Director of Finance, written shortly after the auditer's memo, advising that he, Mr. Hunter, had just authorized Jean Rosow to have access to the petty cash fund in Earl Campbell's absence. (This was contrary to the aforesaid auditor's recommendations in the last paragraph, page 71). The memo then continues: "I would also like to take this opportunity to express my appreciation for the continuing assistance and cooperation of your office and the Internal Audit Division in processing our requests and routine items." (This is sort of like telling the Finance Director to go to hell, but that he sure was a nice fellow). Pages 73 and 74 reflect an incident in which Earl Campbell, Accountant, was instructed by Appellee's receptionist to pay out of petty cash for a delivery of art

supplies to the Appellee, which he did. Appellee reimbursed petty cash the next day. Pages 75 and 76 are the memo from Appellee to all her subordinates about writing up job procedures. Page 77 is a Personnel Department job description for Administrative Assistant V.[1]

Exhibit 29 is a letter to the Appellee from Mayor Lila Cockrell thanking Appellee for the "valuable assistance you gave to building public awareness of the benefits to be gained by the recently passed Capital Improvements Bond Issue." (The record does not reflect what this assistance was).

Leaving the Appellee's exhibits and returning to the Statement of Facts, (pg 92 et seq), Bob Hunter was fired on March 7, 1980, a Friday, by City Manager Tom Huebner. On Monday, March 10, 1980, Louis J. Fox came over to the Planning Department. He was Assistant City Manager and had been appointed by Mr. Huebner to head up the Planning Department on a temporary basis.

"He had a staff meeting with the whole department, and he said that Mr. Hunter had been fired and that he was going to be the acting director while they searched for a new director, and that there had been some problems in the department, and some animosities between the people, but now he wanted to bury all those and move forward together to build a good working relationship between everybody in the department, and to get the job of the department done, which was very important." (SF-93).

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[1] Appellee lacked the desired qualifications for this job. She had no formal education as set forth in the last paragraph thereof.

On Tuesday, March 11, 1980, Louis J. Fox and the Appellee had a private meeting at which Mr. Fox told her that she was a "point of friction" within the department and that she could no longer work there. He gave her 30 days with pay to look for another job in some other City department and said that he would help her in this respect. He never gave her any reason that she was being removed from the Planning Department except that she was a "point of friction."

On March 14, 1980, Appellee wrote a memo to Assistant Personnel Director Leroy Harvey (P's exhib. 30) making herself available for "suitable employment with another City department by April 10".

On April 16, 1980, Appellee contacted Louis J. Fox by telephone and was informed that she had been terminated as of April 11, 1980. She wrote Mr. Fox a letter on April 21, 1980, asking that she be served written notice of her removal and the reasons therefor in conformance with the Municipal Civil Service Rules. (P's Exhib. 31).

On April 22, 1980 she was served with a letter from Mr. Fox to the effect she had been removed April 11, 1980, citing Rule XVII, sec. 2 as grounds. (P's Exhib. 32).

(This letter was not effective to remove her from her job, as the City has agreed from the outset).

The City Attorney's Office advised Mr. Fox of this letter's defectiveness and drafted another letter which complied with the Civil Service Rules (SF-117). Mr. Fox signed this letter.

On May 15, 1980, Appellee was served with a copy of this letter. (P's Ex 33). For the Court's convenience this letter is copied here:

Mrs. Jean Rosow
119 W. Lullwood
San Antonio, Texas 78212

May 15, 1980

Dear Mrs. Rosow:

Effective immediately upon receipt of this letter, you are hereby removed and discharged from your position as an employee of the City of San Antonio.

Subsections (c), (e) and (h) of Section 2 of Rule XVII of the Municipal Civil Service Rules of the City of San Antonio provide that acts of incompetency, discourtesy by said employee to the public or to fellow employees while said employee is in line of duty, and conduct prejudicial to good order are each a ground for the removal of an employee from the classified service of the City.

You are specifically charged with violating the foregoing provisions as follows:

> As an Administrative Assistant in the Department of Planning you were responsible for interpreting and carrying out administrative policies as well as relaying instructions and policy to departmental personnel. In addition, you were responsible for directing the activities of other administrative assistants and personnel assigned to you. You were also required to meet, deal, and maintain effective working relationships with employees. In carrying out these and other duties of your position during but not limited to 1978-79, you failed to perform satisfactorily in these respects. Indirect methods were used in dealing with personnel matters instead of direct and established personnel management methods, an example being use of documentation as a tool for employee harassment. You failed to maintain open and effective communications between the top administrative level in the department and other employees. Your actions contri-

buted to misunderstanding and mistrust between the Director and staff and created a negative work atmosphere which impaired the fulfillment of the department's mission.

Your actions cited above constitute acts of incompetency, discourtesy by said employee to the public or to fellow employees while said employee is in line of duty, and conduct prejudicial to good order and serve as the basis for your removal from the classified service of the City.

You have the right to appeal your dismissal by making a request for a hearing by the Municipal Civil Service Commission. Your appeal must be made in writing to the Civil Service Commission within ten (10) days after you receive this letter, not including Sundays and legal holidays. You have the right to be represented by an attorney at the Commission.

Signed Louis J. Fox
LOUIS J. FOX, Acting Director
Department of Planning

I hereby acknowledge receipt of this letter on this 15th day of May, 1980.

Signed Jean Rosow
JEAN ROSOW

Served at 3:30 p.m. by OSCAR POWELL

CC: Municipal Civil Service Commission
Personnel Department
115 Plaza de Armas
San Antonio, Texas 78205

Appellee was paid her full salary up to the date of receipt of the foregoing letter. (SF-117).

Appellee testified that no one ever counseled her on any of the matters with which the letter charged her.

(Please bear in mind that the only person who could have done this was her superior, Bob Hunter).

Appellee duly appealed from these charges to the Municipal Civil Service Commission, which held a three day hearing on the matter in November, 1980, and returned an order recommending that Appellee be reinstated to her position. A copy of the Commission's decision follows. (P's Exhib. 34).

Mrs. Jean Rosow

November 18, 1980

It is the recommendation of the Commissioner that Mrs. Jean Rosow be reinstated to her position.

The Commission was particularly distressed by the process by which Ms. Rosow was dismissed.

The Commission has made efforts to require specific procedures to be utilized in cases of discipline and dismissal for all classified employees.

The procedures for dismissal of Mrs. Rosow did not follow from a steady progression of counseling and reprimands. Furthermore, the personnel file produced no indication to support the contention that she had been incompetent, discourteous or guilty of conduct prejudicial to good order.

Evidence that was submitted in extensive testimony was based primarily on conjecture and no specific person testified conclusively to the charges as set forth in the dismissal letter.

We respectfully and urgently request a conference with you to discuss this recommendation.

Signed Dr. Prenza Woods
Dr. Prenza Woods
Chairperson

Signed Ms. Dora Salinas
Ms. Dora Salinas
Vice-Chairperson

Signed Dr. L. Tucker Gibson
Dr. L. Tucker Gibson
Member

Appellee applied for and received unemployment benefits from the Texas Employment Commission. How much compensation and for how long was not developed. (P's Exhib. 35).

Appellee looked for a job in the private sector until about mid-July, 1980 and then stopped looking and decided to go into business for herself as an artist. She has been self-employed in such capacity from that time until the present (or at least until the trial). It was stipulated that her average net earnings during this period was $10,000 per year. In fact, she had been working in this capacity while she was with the City.

Almost all of the foregoing was the testimony of Appellee, Jean Rosow on direct, or was taken from exhibits introduced by her on direct. The two statements noted from SF-117 were on cross.

The substance of the rest of the testimony on cross (SF 115-162) follows:

The Appellee had never had a job involving the supervision of personnel until she was made an Administrator V by Bob Hunter in 1976. She had seven people working for her at the time Mr. Fox took over the Planning Department (March 1980). Only one of them, her friend Rosemary Lawson, was still with the City at the time of

the trial. Mr. Hunter's policy about personnel was to tell them what they were doing wrong and then write them memos if they did not straighten out. This was called "building a file" and part of Appellee's complaint in this case is that no file was built on her (SF-130). All she ever got from Bob Hunter was compliments. Out of 20 memos that she wrote complimenting people all but two (2) were to department heads.

Her office was next door to Hunter's yet he wrote her a good many memos complimenting her for various things. The reason he wrote memos instead of just orally complimenting her was to build her a good file. Bob Hunter was Appellee's main support, in fact she was part of the management of the Planning Department. (SF 134, 135).

Some of the people in the Planning Department had high morale and some had low. The planners who had low morale were those who were disappointed because the City Council would not approve projects they had worked on. The ones who had high morale were politically adjusted. Earl Campbell (Accountant) was unhappy some of the time. Americo Canales started out with good morale, but it deteriorated. She did not know why (SF 135, 140).

Mr. Fox, when he gave her thirty (30) days to find a job in another City department, did not tell her why she was being removed from the Planning Department except that she was a point of friction. He would not elaborate. (SF 141).

The memo she wrote to Americo Canales upbraiding him for not having complied with her order to make a "job procedure" for his job (P's Exhib 28, pp 61-62) was

read, in part, to Appellee and she was questioned about it, as follows (SF-143):

"Attached is a copy of the procedure I developed.

It took me ten minutes to write this. I wrote it while waiting for a seminar to start. I realize that you cannot be expected to produce a document as quickly as I, but I do think that an Administrative Assistant I being more familiar with the process should be able to produce a reasonable document in at most four times the amount of time it would take me—40 minutes." Now, you did write that?

A Yes, I did.

Q Do you think, ma'am, that that was a little bit patronizing, a little bit insulting to Mr. Canales?

A I didn't mean it to be.

Q I don't think you did either, but can you see how it would have been?

A I could see how he could have interpreted it that way.

Q And, I think you said his morale was bad, did you not?

A Yes.

Q Do you think maybe things like this might have had something to do with it?

A Well, it's a culmination of a lot of different activities.

Q Did—well, what do you mean by a culmination of a lot of different activities. Was he an unsatisfactory employee?

A He was having a lot of difficulties.

Q What were his difficulties?

A He didn't seem to be able to get his assignments done on time.

Q Was it because he didn't apply himself, or was it because he wasn't very bright, he was lazy or what was he?

A I don't think it was because he wasn't very bright, I think part of the time he wasn't feeling well. He had a lot of physical problems.

Q Among other things, he had shingles, did he not?

A Yes.[2]

On the matter of Earl Campbell's being instructed to pay for some of her art material out of petty cash she stated that it was her receptionist who made such direction because she was confused and that was the only time any money had been taken from petty cash for her benefit. (SF 144-148).

She regarded both Earl Campbell and Americo Canales as being honest persons. (SF-148)

She does not know what, if anything, Louis J. Fox did to help her get another City job. She never talked to him during the thirty (30) days she had to locate another City job. However, she learned of two or three City jobs that she thought she might qualify for and interviewed for them but was not hired. (SF 148-149).

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[2] Americo Canales testified that he had gone to a doctor about his shingles and was told that stress caused the disease. (SF-383).

She took a trip to the Soviet Union. She had studied Russian and this was helpful to her in that country. She was there three (3) weeks in late 1983 and early 1984. (SF 151).

She paid Mr. Cook, the lawyer who represented her before the Civil Service Commission, about $5,000.00. She paid Mr. Heidelberg's firm $10,000.00. (SF 154).

When asked why she was willing to pay $15,000 to try to get back a job with an annual salary of $17,000 or $18,000 five (5) years after she lost it she said that she liked the job and that she thought she would get salary increases and fringe benefits and over 20 years make a lot of money. (SF-155).

When asked why she thought her prospects were so bright when she was fired for being a point of conflict, she said she knew she was a good worker and could do a good job and if a mistake had been made "we would just get over that and go on with it". (SF-155).

When asked if she would rather come back to a job where evidently she did not get along with everyone than try to get a comparable job elsewhere and maybe do a little better, she said she tried for a month and a half in 1980 to find another job. (SF-156).

She acknowledged that there had been problems with the administration of the Planning Department, but did not think that she was a significant part of the problem even though she was part of management of the department. (SF-155).

She had a certain amount of power in the job but did not recall having remarked to a fellow worker that "this

is power" or words to that effect. She said it did not sound like her. (SF-161).

On redirect examination she said that losing her job made her unhappy and depressed and she did not know why she had been fired. She had never been even reprimanded before in any other job and had never been reprimanded by Mr. Hunter. (She had never had another job that involved supervisory duties and Mr. Hunter was her protector and sponsor). Her job has even interfered with her marital relationship. (SF 162-172). On recross examination she acknowledged having made a net of $5,000.00 on art work in one of the years she was with the City, which was not prohibited, but demonstrated that she had been doing art work for years and that it was nothing new to her.

The above summarizes the Appellee's testimony.

Appellee's next witness was her husband, David Rosow.

He testified on direct that they lived at 17102 Turkey Point, San Antonio. (She had testified that this was just south of Loop 1604, in northeast San Antonio). He is an Assistant Director at Southwest Research. "We perform testing of industrial components throughout the United Ctates". (SF-177). He has been employed in that capacity for 12 years.

He and Appellee have had a very close relationship since they first met in 1965. She is intelligent, hard working and honest. She has always been very supportive. All the moves they made (to NASA; White Sands, San Antonio) were at his behest. She is very strong. Once

he had a period of illness (in 1970 or so) and she supported him. They always talked things over with each other when they had jobs with supervising responsibilities.

They have one child, a daughter, about 14.

She has never gotten over having been fired. It demoralized her. She does not know why she was fired.

When she first went to work with the City (1972) it was very important since they needed the income because he was going to school. (NOTE: this must have lasted for about one year, since he has been an Assistant Director at Southwest Research for 12 years).

She was trying to develop a career with the City and she still wants that career because she still thinks she has something to contribute. She thinks the City structure is tolerant enough to realize its mistake. She's willing to forgive and forget.

He has given her emotional support.

On cross, he conceded that the first job she ever had that involved supervising responsibilities was the one she held from 1977 until 1980. (SF-185)

As to whether she wants a career for money or for self fullfillment, she wants it for both, as well as to help the people of the City. (The *citizens* thereof). (SF 187, 188).

She has been an artist throughout her adult years, still is an artist, and has made and still makes a substantial income from it. (SF-188).

Dr. Tucker Gibson was Appellee's next witness. He was a member of the three-member Municipal Civil Service Commission which heard Appellee's appeal in November, 1980.

Dr. Gibson is a Political Science professor at Trinity University and has been such for 17 years. About all he could remember about the hearing on Appellee's appeal 4½ years before was that she had not been progressively disciplined before charges were filed upon her and this concerned him and the other Commission members because they had been trying to get uniformity of progressive disciplining throughout the City organization.

He recalled that no file had been built on Appellee to support the charges against her. He "vaguely" recalled "that in the testimony that was given, inferences were made that it had been a longer problem than was recited", but there was nothing in her record to support this.

On cross-examination he conceded that he "would assume that there would be more supervisory evaluation of a garbage collector than of a manager" and that 90% of the cases the Commission heard during his term had involved persons in the lower rank. (SF-205).

He conceded that if a file was to be built on any employee it would have to be built by the employee's supervisor—in this case, Bob Hunter.

He could not remember who testified before the Commission or very much of what they said. (SF-208).

Parts of the deposition of Tom Huebner, taken by the Appellee, were then read into evidence by the Appellee.

(SF-217), but are not in the Statement of Facts. Appellee rested.

Appellant City's first witness was Tom Huebner, City Manager from 1977-1982, who fired Appellee, overruling the Civil Service Commission.

His testimony established that P's exhibits 1 through 29 were introduced at the Commission hearing on Appellee's appeal and were reviewed by Tom Huebner prior to his overruling the Commission's recommendation that Appellee be reinstated. (SF-238).

Among these documents were the questionaire submitted to all the employees of the Planning Department asking them to note various aspects of its operation, internally and externally. (P's exhib. 28, pg 2-49). (SF-226). The overall effect of the answers to this questionaire (which answers were guaranteed anonimity) was that morale in the Planning Department was very poor; that there was poor communication between the management and the rank and file within the department. In this latter respect, the answers reflected such a bad situation that Mr. Huebner could not believe it, he thought that it was a "set up", that someone had made an effort to make the department look bad. (SF-228).

The situation reflected by the answers to this questionaire had been known to Mr. Huebner and other people in the City government before the questionaire was sent out. In fact, that was why it was sent out. They had just not known how bad things really were until the completed questionaires were received. (SF 224-226).

In reviewing the various documents contained in P's Exhibit 28, Mr. Huebner placed a good deal of emphasis

upon pp 61 and 62, which was the memo from Plaintiff to Americo Canales, upbraiding him about his failure to make up a "job procedure" for his position. The portion thereof which Mr. Huebner particularly found to be improper was read to him at SF-239. "Although I am not as intimately involved with these activities" (the activities of Mr. Canales' job) "as you are, I'm generally familiar with the process. So, I sat down and wrote my thoughts when I had a few spare moments. Attached is the copy of the procedure I developed. It took me ten minutes to write this. I wrote it while waiting for a seminar to start. I realize that you cannot be expected to produce a document as quickly as I, but I think that an Administrative Assistant I being more familiar with the process, should be able to produce a reasonable document in at most four times the amount of time it would take me—40 minutes." Did you look at that document?

A Yes, I did. It is an example of a supervisory attitude that I think is intolerable. You do not elicit support and cooperation of rank and file employees by belittling them, and I consider that memorandum abusing the employee.

Another part of P's Exhibit 28 which Mr. Huebner found significant in determining to fire the Appellee were pgs 70, 71, 72, 73, and 74.

Mr. Huebner was asked about the incident of Earl Campbell's being instructed to pay for some of Jean Rosow's art supplies cut of petty cash. (P's Exhibit 28, pp 73 and 74, related in more detail under Jean Rosow's testimony). Mr. Huebner verified that he had seen these documents when reviewing the Commission's recommendation. There then followed this testimony (SF-240):

Q All right. It seems to be a rather small thing especially since she put the money back, or repaid the petty cash fund. Why did that impress you?

A Well, I think if you review the record and for instance her treatment of Americo Canales on failing to get an assignment done on time, she was something of being a stickler for the rules, and yet in this instance the rules were violated and after it was brought to the appropriate authorities' attention, then the Department Head sent a memo saying yes, she is authorized to make use of the petty cash fund, which is indicative of the relationship that she had with the Department Head, and I think shows one attitude towards the rules with respect to herself, and another towards the other employees.

(NOTE: Earl Campbell's memo to the auditor inquiring as to the propriety of Mrs. Rosow's and Rosemary Lawson's having access to petty cash, the auditor's reply that they were not authorized, and Bob Hunter's subsequent memo to Finance authorizing Mrs. Rosow access were part of what Mr. Huebner was talking about. These matters were set out under Mrs. Rosow's testimony, *supra*, and are reflected by P's Exhibit 28, pp 70-72. However, these exhibits did not relate to the incident of the petty cash payment for Mrs. Rosow's art material. That incident occurred shortly after these exhibits were created. This was developed under Earl Campbell's testimony. (SF 399, 400).

This witness was asked about how many Civil Service cases he had reviewed during his five (5) years as City Manager and he estimated 100. He overruled the Commis-

sion's recommendation "somewhere between four (4) and eight (8) times". (SF-241).

He did not like to overrule the Commission, but under the City Charter the City Manager is the final authority, not the Civil Service Commission, and when he overruled them it was because he thought there was justification. (SF-242).

On cross-examination Mr. Huebner was questioned for some eight(8) pages (SF 243-250) about the "art payment" incident and the Campbell-Auditor memos above. He thought that the latter followed the former, but that for Mrs. Rosow to have access to petty cash was unauthorized whether it was for Planning Department purpose or her own private purposes. He made it clear during his testimony on this subject that he never thought she was stealing. She was "bending the rules for her own convenience". (SF-250).

Appellee had been considered for termination—along with Mr. Hunter and Mr. Eisenmenger—long before Mr. Fox was sent over to the Planning Department because she signed documents for Mr. Hunter and acted for him in other ways; she was part of the management of the Planning Department. That she had substantial authority there was evident from the documents from the hearing, (SF-251) and the morale there was bad.

It was his recollection that Mr. Fox had been over at Planning for about 6 weeks before Mrs. Rosow was terminated. (SF-255).

(NOTE: She was given thirty (30) days notice to find a new City job about two (2) days after Mr. Fox got there.

She was purportedly "fired" as of 30 days later, but was not effectively fired until more then eight (8) ~~weeks~~ later).

As to why he relied solely upon the documentation from the hearing and did not make a further investigation of the Appellee, he knew from the answers to the aforesaid questionaire and from his parleys with the Personnel Director that there was a bad morale problem in Planning; that Mrs. Rosow was part of management of Planning; that there was animosity from lower ranking employees in that department toward management thereof. "Everything pointed to three (3) people" (Hunter, Rosow, Eisenmenger) "who were principally in charge of the planning function." (SF-255, 256).

He did not finally determine to fire Appellee until after he had reviewed the documentation from the hearing. (SF-257).

The fact that he had made no final decision in this regard was evidenced by the fact that he had been inclined to fire Mr. Eisenmenger, but had found out some peculiar circumstances about the latter and did not fire him. (SF 257, 258). (He had testified about this on direct at SF 232-234).

There was more about Mr. Fox's defective firing letter of April 16, 1980, and about the Civil Service System in general. Then he was questioned about why he did not meet with the Civil Service Commission to find out what they meant by their findings that Mrs. Rosow was not fired after "a steady progression of counselling and reprimands." To this latter question, he replied (SF-267):

> "The obvious point there is that her supervisor was Bob Hunter, a department head who I had fired be-

cause of his totally unacceptable style of management, and she was carrying out for him his directives as department head. Of course there would be nothing in her record under Bob Hunter that said there was anything wrong with her, and in fact, I would imagine it's very laudatory."

When asked how he knew that the Commission (which found nothing to substantiate the charges) was less aware of the facts than he, when he did not listen to the tapes of the hearing, he replied (SF-270):

"When I looked at the documented evidence that was presented to the Commission and saw the five (5) memorandums that dealt with Americo Canales and the way he was abused, and the fact that she did not stick to the rules for herself, when she made everybody else stick to the rules, was enough for me to say, here's a person with a double standard. Here's a person that will abuse employees. I could not tolerate any more of that in the Planning Department. It was enough bad shape as it was."

He would have treated Mrs. Rosow the same way he treated Mr. Eisenmenger if their circumstances had been the same (SF-280).

Appellant's second witness was Louis J. Fox. (SF-282)

He is presently City Manager of San Antonio, having succeeded Tom Huebner in that capacity.

After Mr. Huebner had fired Bob Hunter and sent Mr. Fox to head up the Planning Department, Mr. Fox held a meeting with all the members of that department.

He later had a meeting with the Appellee alone "after many of the people in the department came to me and were real disturbed that Mrs. Rosow was going to stay and based on that information I felt that it was in the best interest of the department that she move out of the department. I then suggested that she find another job with the City and I would help her." (SF-283).

At that meeting with her he told her that she was a point of friction within the department and told her of the complaints made to him about her by "a large number of people in the department." If she had asked for an opportunity to refute these complaints, which he could not recall her doing, he thought he would have given her one. (SF-284).

At SF-285, 286 the following occurred:

Q It's part of her testimony that she really had no options about it, and she has been suffering about it ever since. Did you make it clear to her why you wanted her transferred out of that department?

A I told her that there was a general unrest in the department. There was havoc there, that men and women were complaining about her presence, that they didn't trust her. They felt that she had been the person that Bob Hunter used to do quote "dirty work" in the department, and that she was causing a lot of problems. And, just any number of people came to me and complained of that.

Q Did you tell her who the people were?

A Many of the folks, Ernie Alavarez is one, I believe John Mavero, Dick Higby, I believe Mr. Canales and I talked about it, Earl Campbell. I spoke with Al Eisen-

menger because he was again in one of the positions of management in the department, and there was no—there was just no support to have Jean Rosow in the Department. In fact, a lot of people said look, Hunter was a problem, but boy, she was the biggest problem.

Q Did you tell her that?

A I recall—again that was five years ago, but I think I did.

Mr. Fox did not purport to fire her at this meeting. He gave her thirty (30) days to find another job with the City—amounting to leave with pay. (SF-286). He was ready to help her but he expected her to take the initiative.

He had no knowledge of her even making an effort to find a City job. Neither she nor anyone else called him in such connection. "It was almost like she defied it" (getting another City job). (SF 287, 288).

He had felt that she should have a chance in some other department to prove she could get along because, "maybe I was misreading the situation. . . . That would be a way of finding out if she was really a problem or not. I felt she was, but I had enough doubt to say, hey, I'll give you another chance." (SF-289). But he could not keep her in the Planning Department because of all the resentment against her.

Sometime after the expiration of the thirty (30) day period he sent a letter to her telling her she had been terminated as of April 11, 1980 (30 days after he had asked her to look for another City job).

This letter was mentioned earlier herein. It did not comply with the Civil Service rules. After having this called to his attention by David Casas of the City Attorney's office (who handled the Commission hearing) he sent the second letter dated May 15, 1980, which did comply with such rules. She was paid for all the time between the expiration of the thirty (30) day period and the date of service of this second letter. (SF 289, 290).

Tom Huebner did not send Lou Fox over to the planning Department to fire Appellee or anyone else (SF-290).

Since he has been City Manager (the past 3½ years) he has reviewed 65-75 cases from the Civil Service Commission and has never overruled their recommendations. (SF-291).

On cross-examination, Mr. Fox testified that in addition to the complaints he received from Planning Department personnel about the Appellee after he became its Acting Director he had received numerous prior complaints about Mr. Hunter, Mrs. Rosow and Mr. Eisenmenger. (SF 298-302). Some of the complainants were John Navarro, Dick Higby, Americo Canales, Ernest Alavarez, Rose Valdez, Andrew Cameron. (SF-301). Mr. Alavarez and Mr. Navarro came over to his office on one occasion and Mr. Navarro was upset and shaking, in tears. They said that the working conditions there were impossible. They were complaining about Mrs. Rosow. (SF 300-301, 307).

There was a good deal more cross-examination about the Civil Service Rules, about the Commission's recommendation, and about Mr. Fox's drawing up and having

served upon Apellee a defective charge and then having the City Attorney's office compile legally adequate charges. None of this added anything to the relevant prior evidence.

On redirect examination, Mr. Fox testified he expected her to know how to find out what City jobs were available and how to apply for them since she had spent the past several years working for the City (undisputably as an Administrator V for the last 3 or 4 years) and that he thought "she would contact me and tell what she was working on or I'd get some information back. But I never heard from her."

NOTE: At this point it seems evident that for some time immediately prior to Appellee's discharge poor morale in the Planning Department was widespread; that Appellee was a "point of friction" within the department; and that since she was a part of the management in Planning that she was the cause of at least some of this poor morale.

However, Appellant concedes that this much would not be enough to support firing here because it is not specific enough to show a violation by her of any Civil Service Rules. Merely because a supervisor is disliked or is a "point of friction" does not show "acts of incompetency, discourtesy by said emploiyee to the public or to fellow employees while said employee is in line of duty, or conduct prejudicial to good order," with all of which she was charged. But there is one specific act shown (P's Ex 28, pp 61 & 62) which was her rather degrading memo to Americo Canales, upon which Mr. Huebner placed a good deal of weight. This, it is submitted, was a specific act of discourtesy by said employee to a fellow employee, and it is further submitted that this alone would be sub-

stantial evidence to support Huebner's action. This is especially true given the general background set out above. But at this point we come to some more substantial evidence.

Appellant's next witness was Americo Canales. (SF-335).

He was one of the "runner type clerks who did a lot of miscellaneous work for us" as Jean Rosow said. Like all of her other subordinates except Rosemary Lawson he no longer worked for the City. He had the title of Administrator I. His duties consisted of keeping records on annual leave and sick leave; answering the telephone, making repairs to the building; xeroxing; getting tennis balls for the Director, Bob Hunter; washing the City cars assigned to Planning (7 or 8); moving furniture; cleaning the restrooms. "Whatever had to be done I did it." (SF 336-339). As one can see from checking the job procedure that Appellee wrote "eleven (11) minutes before a seminar" (P's Ex. 28, pg 63) few of the above activities were really part of Mr. Canales' job. "The morale in the Planning Department was very low. There was a lot of bitterness. People were kind of depressed, kind of down. I was one of them." (SF-339).

He was humiliated and abused by Mrs. Rosow. (SF-340).

His relationship with her was bad. As an example:

"I would go—this is maybe the heaviest recall I have, because in a way it hurt me the most. There was a time when I had to go to Equal Employment Opportunity to ask for help, because I felt there was discrimination be-

cause I was Mexican. She tried to stop me several times. And, she said to me that she also could accuse me that I don't—I was—I don't like her because she was a female supervisor. I replied to the lady that the person that I always respected and loved the most was a woman, which was my mother. She said to me, I bet your mother is a discriminator as you are. That hurt me, you know.

Q "All right, sir. Can you give us another example of why you thought your relationship was bad with Mrs. Rosow?

A "There was a time when Mrs. Rosow asked me to write my job descriptions in detail. I had Ms. Rose Mary Lawson asking me to do these duties, and Mrs. Rosow asking me to do that. And, also, I had to do my regular chores. And, I was kind of—short of time. And, she gave me—she gave me a written explanation of what I should do with my job description. She said in that counseling that I know that you are not capable of doing as good as I can do—I can do this job description in ten minutes, and I'm sure it's going to take about 40 minutes for you to try to" (do it). —"It was kind of lowering—to me." This humiliated him. (SF-342).

He had a problem with "too many chiefs and not enough indians." As an example, once Rosemary Lawson ordered him to make 235 xerox copies of a two inch thick document. He requested her to check with Jean Rosow because the task was going to take him 2 or 3 hours and Mrs. Rosow had ordered him to do something else which this xeroxing would cause him to neglect. Ms. Lawson told him that she had checked with Mrs. Rosow and that he should go ahead with the xeroxing. He did so and as a

result he got a written reprimand from Ms. Rosow for not completing the task she had assigned to him. (SF 342-345). (P's Ex 28, pp. 67, 68 and 69 reflect part of this incident. These pages are summarized under Jean Rosow's testimony, above). On another occasion a fellow worker, Mr. Leverich, asked him for help on some task. He told Mr. Leverich that he'd be glad to help, but that Mrs. Rosow had him on another project and that Mr. Leverich should check with her. Mr. Leverich told him to go to hell. He told Mrs. Rosow about this and asked what he should do. She told him he'd "just have to take it." (SF 345, 346).

He was once told by Appellee that he'd never be promoted as long as he was in her Department. (SF 346, 347).

After Mr. Canales left the City at the end of 1980 he got a job with the Hyatt Regency Hotel and has worked there ever since. Just after this was developed the following occurred. (SF 348, 349):

> MR. HEIDELBERG: May it please the Court, I don't think anything related to what he did after he left the City of San Antonio, and after the offered facts in this case is relevant to this proceeding.
>
> MR. REEDER: Well, Your Honor, he's gone into millions of irrelevant things. I'm merely wanting to show what the man's capabilities are. We've seen how he was treated.
>
> THE COURT: Counsel he has the perfect right to object, that's what the Rules call for.
>
> MR. REEDER: Well, of course, and I . . . .
>
> THE COURT: If you don't object to his going into irrelevant things, I can't rule. I have to rule if

he objects. Simply because you don't object—I don't see the relevance. I don't see why it's relevant.

MR. REEDER: The relevance is that he was treated like an underling, a part of his testimony, for four years in the Planning Department. He was never able to advance while he was in the Planning Department. He was under the whole time. . . .

MR. HEIDELBERG: May we approach the Bench and not have a Jury argument here.

THE COURT: All right, come ahead.

(Off the record discussion
(had at the Bench out of the
(hearing of the Court Reporter
(and Jury.

THE COURT: Your objection is overruled. Proceed.

Mr. Canales then testified that he had started as a clerk and had advanced through several promotions to the position of night manager of the hotel.

On cross, he stated he knew most of the employees in the department because he kept the records on their sick and annual leave. None of the Planners ever indicated to him that they were upset because some of the projects they were working on were not approved by the City Council. (SF-357).

Mr. Higby, also a subordinate of the Appellee, was not treated fairly. Some people were favorites and others were "kind of put away or something like that." (SF-357).

Jean Rosow's relationship with him was not always bad or hostile. Sometimes she gave him constructive criticism. (SF-358).

After Mrs. Rosow's humiliating memo to him about his failure to make out a job procedure he made one out. (SF-362).

He was asked to explain the incident about Mrs. Rosow's telling him his mother was a discriminator and he went back over it. (SF 365-366).

He's worked for other women supervisors, including at the Hyatt. (SF-366).

He filed an EEO complaint even though Mrs. Rosow tried to prevent it. It's basis was that he was Mexican. He named Mrs. Rosow, Bob Hunter, and Rosemary Lawson as the discriminators. Rosemary Lawson is also Mexican. His EEO complaint was upheld and all the reprimands that Mrs. Rosow put in his file were ordered removed and Mr. Hunter was ordered to give him a letter of recommendation. (SF 368-369).

The manner of Jean Rosow's and Rosemary Lawson's oral communication with him was humiliating. (SF-370).

Mr. Canales agreed with Mr. Heidelberg that different people can read things in different ways and that while he thought that some of Mrs. Rosow's memos to him and some of things she said to him were humiliating that someone else, such as the people on the Civil Service Commission, might think otherwise. (SF-376).

(NOTE: Since the Civil Service Commission was preoccupied about the lack of "progressive discipline" in

Mrs. Rosow's case they may not have been very interested in Mr. Canales' feelings. He testified before them). (SF-383).

Mrs. Rosow shouted at him when she learned he was telephoning the EEO office. She said, "you stop-don't use that telephone." He said "this is my right, Jean. I think I can do this." She said, "I'm telling you not to call Equal Employment Opportunity or something like that."

But he did call EEO, with the aforesaid result. (SF-376, 377).

He was asked about the aforesaid incident involving Mr. Leverich and testified as follows. (SF-377).

> "I remember that I was working on something, sir, and I had to finish something. One of the things that I recall is that I start to get all these notes from Ms. Rosow stating the time when they would give me the notes, and say you have so much time to finish this. They would give them to me to order, and say you have so much time to accomplish these tasks. In other words, my time was always monitored. They would keep control of my time. You would have to do this in a specific time. You have to do this in 60 minutes, you have to do this in 10 minutes and they would give me the note with the time that they would give it to me, and say this should be done by this time.
>
> So, I was doing something, I don't recall what it was. I don't recall. And, Jim Leverich came to me and said I need for you to help me to do this. And, I say, well, sure, just please check with Jean and see if I can stop doing this to help you. He said, well,

I can't get hold of Jean or something like that. I say well, there's no way that I can help you because I have to finish this by this specific time.

And, he said to me, well, if you can't just go to hell. When—then I talked to Ms. Rosow about it, and then I talked to Rosemary, because both of them were my supervisors. The last word from Ms. Rosow was you just have to take it. Just take it, that's it."

There was department policy that if an employee had a grievance he should take it to his immediate supervisor. If he got no result there he should go to the next higher echelon. He was asked if he went to Mr. Hunter, Mrs. Rosow's immediate superior, about Mrs. Rosow's telling him he would "just have to take it." (SF 378, 379). He did not do so because his experience had been that Mrs. Rosow always went to Mr. Hunter right after Mr. Canales had talked to her. She would give Mr. Hunter her version of the facts and he would take her word over that of Mr. Canales. (SF-379). When asked for a specific example of this (SF-379) he gave the following one (SF-380):

"I remember once I went to Mr. Hunter, and—oh, I remember it. This was a time when I got to work and when I got to the office Rose Mary Lawson told me to go and check the central heat of the building. And, I was just in time to work. I went to check the heat. It took me about ten minutes, more or less. When I came back Ms. Rosow met me at the entrance, and she said you are late today. You owe me so many minutes. I told Jean I'm not just walking in the building, I was checking the heating because Rose

Mary asked me. She said that is not true, she said, and besides it doesn't take that long to check the heating. I went to Mr. Hunter and Mr. Hunter said something like this, he say I was accusing Jean of —that I was not on time—that she was saying I was not on time—I don't remember. But, I remember that Mr. Hunter took Jean Rosow's side. It happened a couple of times, but I don't remember. There was a point when I said there's no point in working this job, because Mrs. Rosow—he always would take Mrs. Rosow's side."

On redirect, Mr. Canales was asked if he had ever heard Mrs. Rosow talking about "power". He said that sometimes when she would get something done like getting an extra car for the department she would say "this is power." (SF-382).

There was a period when he was working for Mrs. Rosow that he suffered from shingles which his doctor told him was "due to tremendous pressure." (SF-383).

(NOTE: Mrs. Rosow had testified that Mr. Canales' morale deteriorated because he had health problems. This was noted under the summary of her testimony above).

Appellant's last witness was Earl Campbell. (SF-388).

He worked under Jean Rosow from 1976 until she was fired. He had had 10 years prior experience as a draftsman and 5 years prior experience as an accountant with the Bexar County Auditor.

His job with the Planning Department was that of Accountant. (SF-389).

During the years 1978 and 1979 the morale in the Planning Department was very poor. (SF 389, 390).

For a time during this period his office was right across the hall from Appellee's. On some occasions he heard her "chewing out" Americo Canales. Rosemary Lawson was in Appellee's office on some of these occasions. Ms. Lawson and Mrs. Rosow were close friends. (SF-391).

Bob Hunter was "one of the poorest managers" he had ever seen." He played favorites. He circumvented the rules. He violated many of the principles of good management." The word for Mrs. Rosow was "not very pleasant." When asked why, he said "because of her attitude. If you've ever heard the term "a little power corrupts. . . ." The Court sustained an objection to this. Appellant submits incorrectly. (SF-392).

Mr. Campbell stated that he had trouble with Appellee. He was "quite frequently chastised for either not doing things as they especially wanted them, or maybe not in the same time frame they wanted them." (SF-393).

He recounted the incident of being told by Mrs. Rosow's receptionist to pay for some art material for Mrs. Rosow out of petty cash. He also recounted the incident of checking with the auditor on the authority of Mrs. Rosow to take money from petty cash, the auditor's reply that she was not authorized, and the memo from Mr. Hunter (presumably written by Mrs. Rosow) to the effect that Mr. Hunter had given her authority. (SF 393-397).

After Mr. Hunter and Mrs. Rosow left, employee morale in the department "improved considerably." "The morale problem was because of the management; Mr.

Hunter, Mr. Eisenmenger, Mrs. Rosow and Mrs. Lawson." (SF-398).

On cross-examination Mr. Campbell made it clear that the occasion when he was instructed to pay money out of petty cash for Mrs. Rosow's art supplies was after he had written to the auditor that it was Mrs. Rosow's and Mrs. Lawson's habit to go into petty cash when he was not present, but that the "art supply" incident was a "continuation of the same thing". "This is a violation of City Rules." (SF 399-401).

He overheard part of the conversation between Mrs. Rosow and Mr. Canales about Mr. Leverich having told Mr. Canales to go to hell and her having told him he'd just have to take it. "It was quite obvious he was getting another chewing out, so to speak." (SF-407).

Not everyone in the department had poor morale. (SF-412). He would not necessarily describe her job as being high pressure. (SF-413).

This witness testified before the Commission. (SF-398).

For rebuttal, Appellee called Linda Childs, who was a Planner in the department in 1978 and 1979. She knew Appellee and liked her and Appellee always acted in a "professional" way. She said many of the planners had bad morale because the City Council would not approve their projects. She said Jean Rosow had nothing to do with the planner's bad morale (which is probably true. The planners did not work for her). (SF 415-423).

She said Jean Rosow had never shouted at her (which is doubtless true. She only shouted at her subordinates). (SF-423).

Cross-examination consisted of the following:

Q Mrs. Childs, I have just a few questions here. Did I understand you to say that there was a—there was not a high morale in the Planning Department but it was not all because of Hunter and Rosow, that there were other reasons for there not being high morale?

A That's what I feel.

Q And, you said that Mrs. Rosow always acted professionally and okay towards you when you dealt with her, is that correct?

A Uh-huh.

Q Well, you didn't work for her, did you?

A No, no. We were co-workers.

The next rebuttal witness was Adolph Eisenmenger. His testimony is at SF 424-444. He was a planner and second in command to Mr. Hunter. He was there from 1972 to 1985. Jean Rosow is friend of his and she always was cheerful with him. She never had any cross words for him. She got her work of ordering supplies, getting documents xeroxed, answering letters, etc. done very well. He did not know much about how she did it. He does not know of any discourtesy by her to anyone, but he was not around her when the discourtesies that have been related occurred. She certainly was not discourteous to any member of the Planning Commission. (This is doubtless true. She wasn't discourteous to anyone but subordinates).

There was bad morale among many of the planners because the City Council would not approve their Master Plan.

He never saw Appellee be incompetent.

Mr. Hunter was fired because the City Manager needed a scape goat for the rejection by the Council of the Master Plan.

He was familiar with the survey made by Personnel and which is part of the subject of Plaintiff's Ex. 28. He did not seem to think much of it. It was just something City Hall wanted. (SF-433). He said, "Jean Rosow was an extremely important figure in the department." (SF-439).

Appellee's next rebuttal witness was Basil Opalenik. He had been an investigator with the City's EEO Program during the latter 1970's and early 1980's. He dealt with a good many City administrators and Appellee was one of them. She was courteous and professional. He was surprised to find out that she was an Administrator V and "I said this must be some sharp lady to be Administrator V because there aren't many ladies within the City that have that type of rank". (SF-450).

He vaguely remembered Americo Canales but could not remember much else.

Appellee's last rebuttal witness was her friend Rosemary Lawson. Ms. Lawson's office was close to those of Mr. Hunter and Appellee. She never saw Mrs. Rosow act abusively toward anyone---subordinates or otherwise. She was pleasant and respected them. The bad morale in

the Planning Department was mainly with the planners. Appellee's job was to assist the Director and the Assistant Director and she oversaw the Administrative Assistants and Accountants. "Her responsibility included everything and anything that the planners and directors needed. Whatever they needed she would get it." (SF-465).

She was a very gifted worker, very efficent.

This witness was not cross-examined.

Supreme Court, U.S.
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No. 87-965

In The
Supreme Court of the United States
October Term, 1987

CITY OF SAN ANTONIO,

Petitioner,

vs.

JEAN ROSOW,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner has failed to invoke the jurisdiction of this Court, and has failed to raise a substantial federal question. However, Respondent submits that the controlling question of this case may be presented as follows:

> Whether there is a violation of the state and federal due process rights of a classified civil service employee where the City Manager disregards the recommendations of the Civil Service Commission by summarily terminating the employee without reviewing the record or evidence compiled before the commission, and without affording the employee the right to confrontation.

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BEST AVA

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JEAN ROSOW,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Petitioner has failed to invoke the jurisdiction of this Court by citing only 28 U.S.C. § 2101(c), a non-jurisdictional statute. The jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) may not be invoked by Petitioner because the Supreme Court of the State of Texas decided this case not on the basis of any federal question, but on

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the grounds of multiple procedural defaults and omissions committed by the Petitioner in the trial court.

STATEMENT OF THE CASE

The Petitioner's statement regarding the course of proceedings and review of facts contains numerous inaccuracies and omissions. Rather than correcting these errors individually, Respondent adopts and incorporates by reference the statement contained in the opinion of the Texas Supreme Court. *Rosow v. City of San Antonio*, 734 S.W.2d 659 (Tex. 1987).

REASONS FOR DENYING THE WRIT

1. Petitioner failed to raise a substantial question of federal law.

The first question presented by Petitioner has been repeatedly decided by this Court, and is a matter of settled federal law. As this Court has stated in the past regarding 42 U.S.C. § 1983.

> As introduced and enacted, it serves only to insure that an individual has a cause of action for violations of the constitution which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by Section 1 of the 1966 Act.

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 60 L.Ed.2d 508, 99 S.Ct. 1905 (1979). Section 1983 merely provides a remedy by authorizing a cause

of action. Respondent sought the remedy provided by § 1983 for the unconstitutional deprivation of her vested property interest and expectation of continued employment. *Rosow v. City of San Antonio*, 734 S.W.2d at 660; City Charter of San Antonio, Rule XVII, § 1, § 3.

Petitioner has consistently and erroneously characterized Respondent's cause of action as an appeal from an administrative decision rather than as an original action for the deprivation of her constitutional right to due process. *City of San Antonio v. Rosow*, 716 S.W.2d 663, 635 (Tex. App.—Corpus Christi 1986), *rev'd* 734 S.W.2d 659 (Tex. 1987). The focus of these causes of action are separate and distinct, as are the standards of review applicable to them. In Texas, an appeal from an administrative agency is subject to "substantial evidence de novo review" which denies the litigant a trial by jury. Reversal of the administrative decision requires that no reasonable mind could fail to differ with the decision. *See* Reavely, *Substantial Evidence and Insubstantial Review in Texas*, 23 S.W.L.J. 239 (1969). It is a narrow inquiry into the factual sufficiency of the administrative decision.

In contrast, the thrust of the Respondent's case was directed towards the procedures used in her discharge by the City Manager.

> The gravamen of Rosow's complaint was that she was denied procedural due process because she was not afforded an opportunity to present her side of the evidence before the ultimate decision maker, Huebner. Her pleadings frame the cause of action as an original action based on an unconstitutional deprivation actionable under 42 U.S.C. § 1983.

Rosow v. City of San Antonio, 734 S.W.2d at 660.

The liability issue submitted to the jury in this action contained the words "arbitrary and capricious." (Tr. 34). The Petitioner claims that the term "arbitrary and capricious" is the same as "not supported by substantial evidence." Petition for Certiorari, page 9, *citing Gerst v. Guardian Savings*, 434 S.W.2d 113 (Tex. 1969); *Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984); *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1972); *Green v. Board of Regents of Texas Tech University*, 474 F.2d 594 (5th Cir. 1973). None of these cases support the Petitioner's contention.

Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 454, cited by Petitioner, in fact reaches the opposite conclusion.

> In *Lewis v. Metropolitan Savings & Loan Association*, 550 S.W.2d 11 (Tex. 1977) [w]e held that instances may arise in which the agency's action is supported by substantial evidence, but is arbitrary and capricious nonetheless. One such instance is when a denial of due process has resulted in the prejudice of substantial rights of a litigant.

Petitioner has not argued, nor could it argue, that as a matter of federal law, Respondent was entitled only to substantial evidence de novo review. Substantial evidence review is a creature of Texas law. *See, e.g., City of Amarillo v. Hancock*, 239 S.W.2d 788 (Tex. 1951). The Texas Supreme Court rejected the substantial evidence review standard in Respondent's cause of action.

> We hold that the court of appeals erred ar characterizing [petitioner's] § 1983 claim as an appeal from an administrative decision and accordingly reverse the

> judgment of the Court of Appeals and affirm the judgment of the trial court.

Rosow v. City of San Antonio, 734 S.W.2d 659 (Tex. 1987). Accordingly, the Texas Supreme Court did not hold that § 1983 changed the applicable substantive and procedural law, as Petitioner contends, but rather held that the substantial evidence rule was not applicable in this case.

Finally, the petition should be denied because the decision of the Texas Supreme Court rests solely upon independent state procedural grounds. The Texas Supreme Court never reached the substance of the Respondent's § 1983 claim because the Petitioner failed to preserve the error it now raises.

> Testimony developed during trial in support of her § 1983 claim was received without objection by the City. Indeed, the record before us demonstrates that no objections were made by the City to either the pleadings, the evidence or the issue and instructions submitted to the jury and that the City first complained or gave notice of its contentions in its Motion for Judgment N.O.V.

Rosow v. City of San Antonio, 734 S.W.2d at 660.

> Thus, the Court of Appeals erred in characterizing Rosow's suit as an administrative appeal and in failing to review this case as a § 1983 claim. However, because the City has failed to preserve the right to complain of the trial court's judgment based on Rosow's § 1983 claim, such judgment must stand.

Rosow v. City of San Antonio, 734 S.W.2d at 661. The basis for the Texas Supreme Court's decision was reinforced by a concurring opinion by Justice Spears, joined in by Justices Wallace, Robertson, and Mauzy:

> Rosow pleaded her case under 42 U.S.C. § 1983 and presented evidence in support of that claim. - The jury found for Rosow on her § 1983 issue. The City failed to object to any of these actions. . . . these were not preserved for review by the City.

Rosow v. City of San Antonio, 734 S.W.2d at 661.

Respondent has diligently searched the Petition for a meritorious reason for granting Writ of Certiorari. On page 7, the Petitioner may be attempting to argue that there is a conflict between the decision of the Texas Supreme Court in the instant case and prior Fifth Circuit cases construing 42 U.S.C. § 1983. The cases cited by Petitioner reveal no such conflict. In *Duke v. North Texas State University,* 469 F.2d 829 (5th Cir. 1973) a panel of the Fifth Circuit reversed an order granting a preliminary injunction reinstating a University teaching assistant. *Duke v. North Texas State University,* 338 F.Supp. 900 (E.D. Tex. 1971). The Fifth Circuit found that since Duke had been afforded due process, it was therefore necessary to grant school authorities the deference they are customarily afforded upon review of the factual sufficiency of their actions. The other case cited by Petitioner in an apparent attempt to raise conflict, *Green v. Board of Regents of Texas Tech University,* 474 F.2d 594 (5th Cir. 1973), was a § 1983 case which was tried as a bench trial. *See Green v. Board of Regents of Texas Tech University,* 335 F.Supp. 249 (N.D. Tex. 1971). There is no indication that Green requested trial by jury, and consequently the case was reviewed under the familiar standards imposed by FED.R.CIV.P. 52(a). Neither case stands for the proposition that the Fifth Circuit has ever applied the substantial evidence rule to a case in which there was a prima facie showing of a

denial of procedural due process. In contrast, *Davis v. West Community Hospital,* 755 F.2d 455 (5th Cir. 1985), which the Texas Supreme Court cited in its opinion, stands for the proposition that a litigant is entitled to trial by jury in a § 1983 action in which evidence developed before a hearing committee was disregarded by an ultimate decision maker.

2. The burden was upon the Petitioner to show that there was no causal relation between the constitutional violation and the Respondent's damages.

The Petitioner claims, for the first time in this Court, that the burden was upon Respondent to obtain a finding that the due process violations were a cause in fact of her damages. For this proposition Petitioner cites *Carey v. Piphus,* 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978). In fact, *Carey* cast the burden upon the Petitioner-Defendant of obtaining an affirmative finding that there was no cause in fact relation between the constitutional violation and the plaintiff's damages, i.e., that the Respondent would have been fired even if she had been afforded her consitutional rights. *Carey v. Piphus,* 435 U.S. at 260. *See also, Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274, 285-287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). The failure of Petitioner to previously raise this contention before the trial court, the court of appeals or the Texas Supreme Court clearly constitutes a waiver. Since the appropriate procedure would have been for the Petitioner to have requested a jury issue and instruction at trial its abject failure to do so resolves the issue before this Court purely on the basis of Texas procedural law. Rule 279, Tex.R. Civ.P.

The Petitioner has confused its own burden of establishing that there was no cause in fact relation between the constitutional violation and the Respondent's damages with the Respondent's true burden of proving actual damages. Petitioner now contends that Respondent failed to establish that injury resulted from her constitutional violations, despite the fact that the Petitioner *stipulated* that Respondent's actual damages amounted to $131,581.66. (Plaintiff's Ex. 40). The Respondent proved additional damages, and the jury awarded her the total amount of $150,000, plus attorney's fees. In this regard, the Texas Supreme Court stated:

> Rosow was unquestionably deprived of that [vested property right, in her job and an expectation of continued employment] which she contended was effected in violation of her right to procedural due process.

Rosow v. City of San Antonio, 734 S.W.2d at 661.

Petitioner waived the right to complain of the omission of a jury issue inquiring as to whether Respondent would have been discharged even if her constitutional right to due process had been provided by the city. *See Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955). The Texas Rules of Civil Procedure require that the party bearing the burden of obtaining an affirmative finding on a defensive issue submit the issue to the trial court judge in substantially correct term. Rule 277-279, Tex. R. Civ. P. The failure to submit a question to the jury is not grounds for complaint unless the complaining party requested in writing the submission of the question. *Id.* In contrast, an omitted *element* of liability is deemed *found* if there is evidence to support it. Rule 279, Tex. R. Civ. P.

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Respondent presented evidence of constitutional violations and resulting damages. The jury returned a verdict finding that the City Manager of the City of San Antonio had acted arbitrarily and capriciously, and awarded her damages in the amount of $150,000. Petitioner neither requested nor objected to the submission of any special issue to the jury. The duty to request an issue inquiring as to whether Petitioner would have been discharged absent violations of her civil rights was that of the Petitioner, as a matter of both Texas law and prior holdings of this Court.

———o———

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 87-965

In The
Supreme Court of the United States
October Term, 1987

—o—

CITY OF SAN ANTONIO,

Petitioner,

vs.

JEAN ROSOW,

Respondent.

—o—

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

—o—

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—o—

Respondent (Brief, p. 7) says that "the Petitioner claims, for the first time in this Court, that the burden was upon Respondent to obtain a finding that the due process violations were a cause in fact of her damages. For this proposition Petitioner cites *Carey vs. Piphus,* 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978)".

It is not correct that this claim was made for the first time in this Court. It was made in the State Supreme Court at pp. 17-18 of Petitioner's Response to Application for Writ of Error and it was made in the Court of Appeals at pp. 4-5 of Appellant's Reply to Appellee's Post-Submission Brief.

Furthermore this "claim" is correct. All of Respondent's evidence on *damages* consisted of her testimony and that of her husband about her mental distress at *losing her job*—at being *fired*—and not about her distress, if any, about not getting a hearing before Huebner (which, of course, was the procedural due process defect relied upon).

If the Petitioner is correct that there was substantial evidence to support Huebner's firing Respondent then her firing was justified and the Petitioner, of course, is not liable for the matters about which she and her husband testified, which matters did not relate to denial of procedural process.

Respondent states on page 8 of her brief that "Petitioner stipulated that Respondent's actual damages amounted to $131,581.66." What Petitioner in fact stipulated to was that Respondent's loss of earnings together with pre-judgment interest and other items over the five (5) year period from her firing to the time of trial was the above amount. This is hardly a stipulation of liability for either substantive or procedural due process denial.

The case resolves itself to this: There was justification for Huebner's firing Respondent, but his failure to give her a hearing violated her procedural due process rights. However, all of the damage evidence, including

that stipulated, related to her having been fired. It did not relate to the procedural due process violation. There was no evidence bearing upon the question of what, if any, damage she sustained from the violation.

Petitioner submits that the only damage Respondent *could* have sustained (in light of her own testimony and that of her husband) from this latter violation was that such violation *caused her to be fired.* Under *Carey vs. Piphus, supra,* she had to prove her damages and there is no proof by her of the causal connection, if any, between the procedural violation and her damage. In fact, the evidence indicated rather forcefully that a hearing before Huebner, at which Canales and Campbell testified, would have sealed her doom—judicially as well as administratively.

Respectfully submitted,

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